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(28,974)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 424.

AMERICAN RAILWAY EXPRESS COMPANY, PETITIONER,

vs.

LUCIUS P. LEVEE.

ON WRIT OF CERTIORARI TO THE COURT OF APEAL, FIRST CIRCUIT, OF THE STATE OF LOUISIANA.

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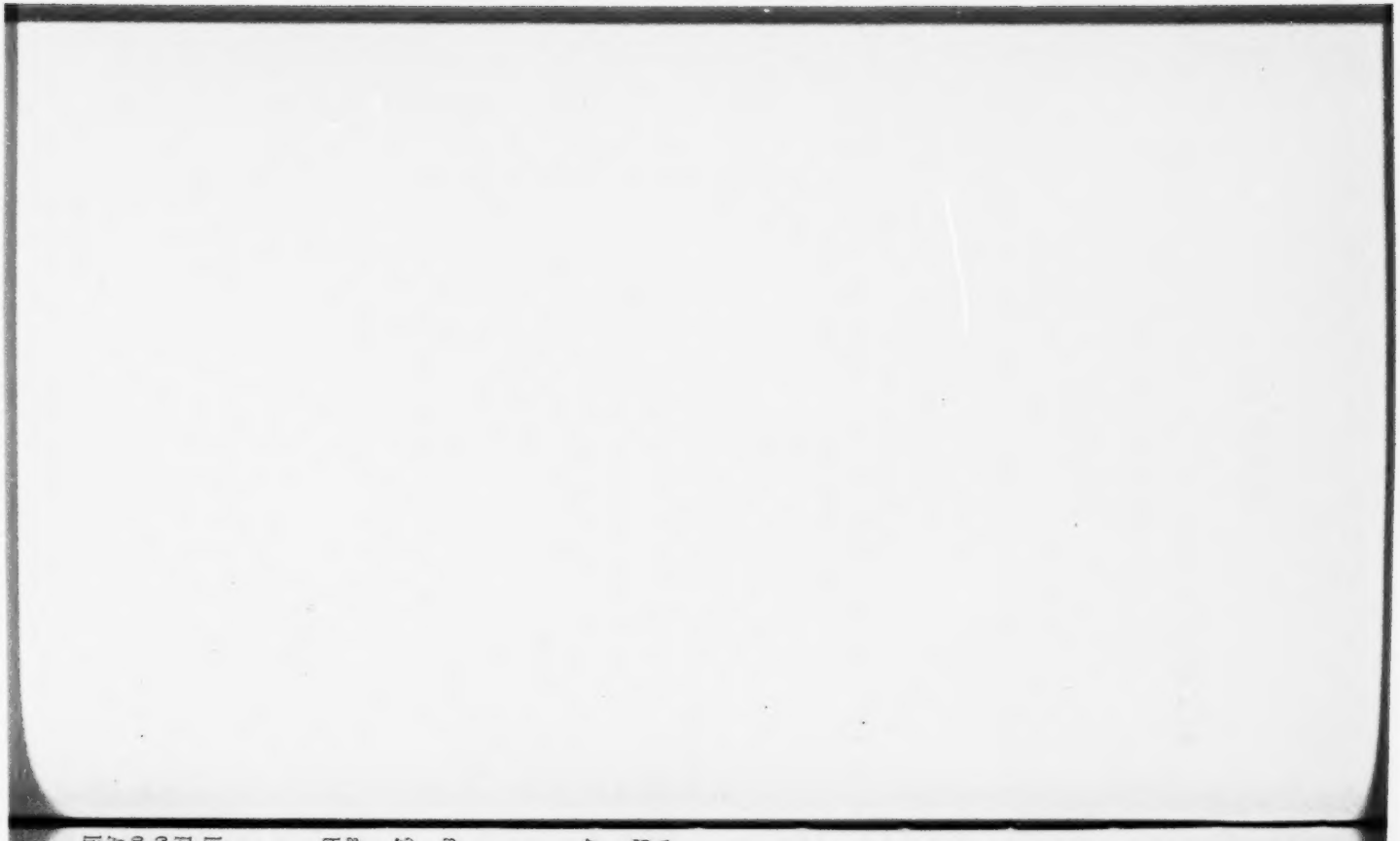

1 TRANSCRIPT OF PROCEEDINGS.

Supreme Court of the United States.

No. —.

In the Matter of AMERICAN RAILWAY EXPRESS Co., Petitioner,

versus

LUCIUS P. LEVEE, Respondent.

EXHIBIT A.

Supreme Court, State of Louisiana.

No. 25170.

LUCIUS P. LEVEE

vs.

AMERICAN RAILWAY EXPRESS Co.

On application of the American Railway Express Company for a writ of certiorari directed to the Court of Appeals, First Circuit, State of Louisiana.

Assignment of Errors in Petition for Certiorari to Supreme Court of Louisiana.

I.

The Court erred in applying to a determination of the rights arising from a contract for the shipment of a trunk in interstate commerce rules applicable to shipments in intrastate com-
2 merce. Adams Express Co. v. Croninger, 226 U. S. 491, holds that the interpretation and administration of rights arising from contracts for interstate shipments are governed solely by United States statutes and the decisions of Federal Courts.

II.

The Court erred in failing to give application to the limitation of liability provided in the contract which was made a part of the petition and was the contract upon which suit was brought. This contract was the law between the parties and contained the measure of their rights. In Tardos v. C. St. L. & N. O. R. R. Co., 35 La. Ann. 15, this Court held that a carrier by offering two rates might limit its liability to an agreed valuation, and that the shipper who

sues on such a contract cannot recover more than the amount of the liability stipulated in the contract.

III.

The Court erred in holding that a shipper who sued for the loss of his trunk upon a contract limiting the liability of the carrier could secure the amount which the obligation to pay a larger rate would have given him, by charging that the loss occurred through the negligence of the carrier. The recovery of any amount depends upon the breach of the contract, but the measure of the recovery depends upon the rate paid or to be paid by the shipper.

IV.

The Court erred in holding that because the agent was not able to tell the shipper the amount in dollars and cents that the shipper was not held to the limitations of his contract when the con-
3 tract was received and accepted by him, was never repudiated but was affirmed by his suit upon it without any allegation or proof that would relieve him from its terms. Tardos v. C. St. L. & N. O. R. R. Co., 35 La. Ann., 15.

V.

The Court erred in failing to hold that every shipper was held to a knowledge of the rates applicable to a shipment, and that since the contract tendered and accepted by him showed that there were two rates and that his contract called for the payment of the lower rate with the consequent limitation of liability, therefore he was bound by the terms of the contract. Tardos v. Railroad Co., 35 La. Ann. 15; Louisiana Ry. & Nav. Co. v. Holly, 127 La. 615; Mugg v. Texas & Pacific Ry. Co., 202 U. S. 242; Illinois Central R. R. Co. v. Henderson Elevator Co., 226 U. S. 441.

VI.

The Court erred in failing to uphold the limitation of liability by awarding the plaintiff only the amount of Fifty Dollars stipulated as the limit of liability of the carrier in case of loss of the goods, and which limitation of liability was based upon the benefits received by the shipper who is obligated to pay the lower rate as a predicate for such limitation of liability. The identical contract has been held valid and the limitation of liability applied in all United States Supreme Court decisions dealing with the same or similar provisions in contracts of shipment. Adams Express Co. v. Croninger, 226 U. S. 491; Kansas City Southern R. R. v. Carl, 227 U. S. 639; M. K. & T. R. R. v. Harriman, 227 U. S., 657; B. & M. R. R. v. Hooker, 233 U. S. 97; Piper v. B. & M. R. R., 246 U. S. 439.

4 *Petition Writ of Certiorari, Supreme Court of Louisiana.*

To the Honorable the Supreme Court of the State of Louisiana:

The petition of the American Railway Express Company a corporation exercising the business of a common carrier in interstate and intrastate commerce, with respect represents:

I.

That on the 8th day of February, 1919, Lucius P. Levee entered into a contract with the American Railway Express Company for the transportation of a trunk from Madisonville, Texas, to Thibodeaux, Louisiana, which trunk was lost and was never delivered to the said Lucius P. Levee.

II.

Your petitioner further represents that the said Lucius P. Levee filed suit against your petitioner in the Twentieth Judicial District Court in and for the Parish of Lafourche, alleging the loss of said trunk and annexing to his petition and making it a part thereof the contract entered into between him and petitioner.

III.

Your petitioner further represents that said contract upon which the plaintiff sued stipulated that in case of loss or damage to the said trunk the liability of your petitioner herein should be limited to the sum of Fifty ($50) Dollars; that notwithstanding
5 said limitation of liability in the contract on which the said Lucius P. Levee sued, the plaintiff prayed for a judgment against petitioner in the sum of Eight hundred, sixty three 75/100 ($863.75) Dollars, with interest from date of judicial demand.

IV.

Your petitioner further represents that it admitted the execution of said contract and that the trunk had never been delivered to the said Lucius P. Levee, and further averred that the contract upon which he had sued was the legal contract approved by the Interstate Commerce Commission and which governed the rights of the parties thereunder.

V.

Your petitioner further represents that there was judgment in favor of the plaintiff and from the judgment your petitioner appealed to the Court of Appeal for the First Circuit, and by which Court said Judgment was affirmed.

VI.

Your petitioner further represents that the said Court of Appeal erred in failing to recognize that the contract was one concerning the transportation of goods in interstate commerce and subject to the laws of the United States regulating the rights of carriers and shippers in interstate commerce, and that the decisions of the United States Supreme Court had repeatedly recognized and upheld the validity of contracts exactly alike in terms, and that in all cases where suits had been brought on such contracts the plaintiff had
6 been allowed to recover only the sum specified as the limited liability of the carrier; and that the Court of Apepals further erred in applying to the decision of this case the decisions of State Courts regulating the rights of carriers and shippers and without regard to the special contract entered into between the plaintiff and the defendant in this case, and which contract because of its approval by the Interstate Commerce Commission, as shown by the published tariffs introduced in evidence, was the law governing the rights of the parties.

VII.

Your petitioner further represents that the Court of Appeal has held that because your petitioner failed to show that the trunk was lost through some accidental or uncontrollable event, that it thereby admitted converting it to its own use and that having failed to show that it was not responsible for the loss of the trunk, under the decision of your Honors in cases applying the general rules regulating carriers, that it became liable.

VIII.

Your petitioner further represents that the evidence shows that there were two rates in effect which were open to the shippr and that under one of these rates the liability of the carrier was to pay for the entire value of the shipment lost, and that under the other rate, which was the lower rate, the liability of the carrier in case of loss or damage to the shipment was held to the payment of only Fifty Dollars; that the shipper entered into and sued upon a contract whereby he was obligated to the payment of the lower rate and whereby the carrier was obligated to the payment of the liabil-
7 ity of Fifty Dollars in case of loss or damage. The Court of Appeal says that the evidence shows that the agent of the carrier at the point of shipment did not know the rate and prevented the shipper from making a declaration as to its value. The proof is that the agent knew that there were two rates applicable, but did not know the lump sum to be charged at the point of destination, and sent the trunk collect, and the carrier was entitled to collect only the lower rate if the trunk had been safely delivered. The petition further shows that the contract limiting the liability of the carrier was accepted by the plaintiff and it was upon that contract and no other contract that he sued. This contract plainly stipulated

that the liability of the carrier was limited to Fifty Dollars, and at no time did the plaintiff offer to enter into any other contract and at no time has he repudiated this contract, but on the contrary adopted it by filing suit thereon.

IX.

In Adams Express Co. v. Croninger, 226 U. S. 491, it was held that since Congress had undertaken to regulate interstate commerce it intended there should be a uniform rule as to the liabilities of carriers under bills of lading. The Court said:

"The duty to issue a bill of lading and the liability assumed thereby are covered in full and though there is no reference to the effect upon State regulation, it is evident that Congress intended to adopt a uniform rule and relieve such contracts from the diverse regulation to which they had been theretofore subject."

This is the leading case on the subject and has been repeatedly quoted.

8 In the case of Texas & Pacific Railway Co. v. Mugg, 202 U. S. 242, the Court held that every shipper was held to a knowledge of the tariffs on file, and even though a lower rate was quoted by the agent and resulted in injury to the shipper, the shipper was held to the payment of the higher rate.

In Illinois Central Railroad Company v. Henderson Elevator Co., 226 U. S. 441, the Court said in the syllabus:

"Failure to post rates does not estop the carrier from collecting the published tariff rate, notwithstanding a lower rate may have been quoted to the shipper. Kansas City Southern R. R. v. Alba Commission Co., 223 U. S. 573."

In M. K. & T. R. R. v. Ward, 244, U. S. 384, it was held that every shipment constituted one contract and that the shipper could not make the carrier make a second contract.

From these decisions it follows that when the plaintiff accepted the contract tendered him with the limitation of the liability of the carrier, that that was the only contract which could be made between the parties, and that plaintiff is bound by the terms of that contract.

X.

The Supreme Court of the United States has repeatedly passed upon the very contract in question and has always upheld the stipulation for a limited liability. In Adams Express Co. v. Croninger, 226 U. S. 491, the shipper accepted a contract similar in terms to the contract herein sued upon. The Court said:

"The knowledge of the shipper that the rate was based upon the value is to be presumed from the terms of the bill of lading and of the published tariff filed with the Commission. That presumption is strengthened by the fact that across the top of this bill of lading there was this statement in bold type: 'This Company's charge is based

upon the value of the property, which must be declared by the shipper."

9 The contract in this case is similar. The shipper in that case was held to the limited liability of fifty dollars. Among other cases in which the Croninger case has been affirmed is Kansas City Southern R. R. v. Carl, 227 U. S. 639; M. K. & T. RR. v. Harriman, 227 U. S. 657; Boston & Maine R. R. v. Hooker, 233 U. S. 97; Piper v. Boston & Maine R. R. 246 U. S. 439.

XI.

Your petitioner further represents that since this is a contract of shipment in interstate commerce, it is subject to the regulation of the laws of the United States; that the contract herein sued upon has been approved by the Interstate Commerce Commission, and the terms of that contract is the law between the parties; that the contract limits the liability of the carrier in case of loss to the shipper to an agreed valuation of Fifty Dollars; that the Supreme Court of the United States in the Croninger case and other cases in an unbroken line of decisions holds that since there were two rates, the contract stipulating for a limited liability of Fifty Dollars where the lower rate was to be charged, is a valid stipulation and binding upon the parties; that since the contract sued upon being a valid contract stipulates that in case of loss of goods to the shipper he shall be entitled to recover only Fifty D-llars, and since he has sued upon that contract and has thereby affirmed its provisions in the most solemn way known to the law, that the Court of Appeals was without right to apply to the determination of the rights of the shipper any of the rules of State law, but was held to the application of the laws of the United States and the decisions of the Supreme Court of the United States interpreting and applying these

10 laws; that the Court of Appeals in failing to apply the federal statutes and the decisions of the Federal Courts erred to the prejudice of your petitioner herein and to the destruction of its rights created by the contract upon which the plaintiff sued, and that to the end of rectifying the error of the Court of Appeals a writ of certiorari should be granted herein for that purpose.

XII.

Your petitioner further represents that it has applied for a rehearing to and been refused by the Court of Appeal- for the First Circuit; that it has given notice to the said Court of Appeal- for the First Circuit and the members thereof, and also has given notice to the plaintiff, Lucius P. Levee, of the intention of petitioner to apply to your Honorable Court for a writ of certiorari; and that it annexes hereto a transcript of the minutes of said Court showing the application and refusal for a rehearing, a copy of the petition and answer and a copy of the judgment of the Court of Appeals herein, and a copy of the brief on the argument of the case and a copy of the brief and application for rehearing.

Wherefore, your petitioner prays that a writ of certiorari be granted it, directing and commanding the Court of Appeal- for the First Circuit to send up to this Honorable Court the entire record in this case, in order that it may take cognizance thereof and render the proper decree herein.

(Signed) HUNTER C. LEAKE,
(Signed) ARTHUR A. MORENO,
Attorneys for Petitioner.

11

Affidavit.

STATE OF LOUISIANA,
Parish of Orleans:

Before me, the undersigned authority, personally came and appeared Hunter C. Leake, who, being duly sworn, deposes and says:

That he is attorney for the American Railway Express Company, whose domicile is at Wilmington, in the State of Delaware; that none of the officers of said corporation competent to make oath hereto are in the State of Louisiana, and that he is authorized to and makes this affidavit as the representative of the American Railway Express Company;

That an application for a rehearing has been made to the Court of Appeals for the First Circuit and that the application for such rehearing was refused on February 11, 1922, as appears from the certificate of the Clerk of Court; that there has been filed with the Clerk of the Court of Appeal- on behalf of the American Railway Express Company a notice addressed to Lucius P. Levee and to his counsel of record, of the intention of the petitioner to apply to this Honorable Court for a writ of certiorari; that there has also been sent to the judges of the Court of Appeal- a notice of intention to apply for a writ of certiorari.

That affiant has read the foregoing application for a writ of certiorari and that the allegations therein contained are true and correct.

(Signed) HUNTER C. LEAKE.

12 Sworn to and subscribed before me, this tenth day of March, 1922.

(Signed) R. E. BELL,
Notary Public.

Entry Showing Refusal of Supreme Court of Application for Writ of Certiorari.

Refused for the reason that the judgment is correct.

(Signed) D. N. THOMPSON.
O. O. PROVOSTY.
B. C. DAWKINS.
W. OVERTON.
J. ST. PAUL.
March 13th, 1922. J. R. LAND.

13 *Finding of Facts, Opinion, and Decree of Trial Court.*

State of Louisiana, 20th Judicial District Court, Parish of Lafourche.

No. 4977.

LUCIUS P. LEVEE

vs.

THE AMERICAN RY. EXPRESS CO.

Plaintiff sues defendant for $863.75 with legal interest from judicial demand till paid for the alleged value of his trunk, and its contents, which he delivered to defendant's agent at Madisonville, Texas, for shipment to his plaintiff's address at the town of Thibodaux in this parish, and which the said Express Company failed to deliver to him at the said Town of Thibodaux, despite his demand for the same.

Defendant's only defense is that its receipt or contract for the carriage of said trunk, limited its liability in case of loss to $50.00, and plaintiff cannot recover any larger amount.

The evidence, which is uncontradicted, shows the trunk and its contents to be reasonably worth the amount sued for—$863.75.

Neither the pleadings nor the evidence shows positively what became of the trunk after its delivery to the defendant. All that is known is that it was delivered to the defendant carrier on February 8th, 1919, at Madisonville, Texas, for shipment to the said town of Thibodaux, La., and that it was never delivered to the said

14 shipper and consignee at the latter place, or any other place.

The statement by plaintiff that it was lost does not explain what became of the trunk. He evidently meant by this statement that it was "lost" to him because he subsequently stated that he did not know what became of it. In the nature of things he could not know or be expected to know what become of the trunk. No one but defendant and its agents who had it in charge were in a position to know or have such knowledge.

When plaintiff delivered his trunk to defendant's agent at Madisonville, Texas, he asked that it be sealed and shipped to his address at Thibodaux, La. The agent suggested to him to have it checked. Plaintiff refused, saying he did not want to take any chances of having it lost as baggage as he had some valuable papers and other valuables in it and wanted it sealed and expressed to his address at the said town of Thibodaux, to which place he was going. The agent stated he did not know the rate, could not apply one and he would have to ship it "Collect" and the charges whatever they might be would have to be paid by plaintiff at Thibodaux on the delivery of the trunk to him. Beyond telling the agent that the trunk contained valuable papers and other valuables, and cautioning him to have it properly sealed to prevent access to such valuables, plain-

tiff did not give or declare the value of the trunk and its contents nor did defendant's agent ask or demand their value from plaintiff.

The weight of the trunk, however, was either given by plaintiff or it was ascertained by the express agent for the receipt which he gave for it to plaintiff fixed the weight at 100 pounds.

15 This receipt, which is annexed to plaintiff's petition is admitted to be the uniform receipt of the defendant Company, and that it has been filed with, and approved, by the Interstate Commerce Commission.

As defendant contends that its liability to plaintiff is measured by this receipt it will be here transcribed.

At the top of the receipt appears this legend in large type:

"The company will not pay over $50.00 in case of loss, or 50 cents per pound, actual weight, for any shipment in excess of 100 pounds, unless a greater value is declared and charges for such greater value paid."

The body of the receipt reads as follows:

"American Railway Express Company.

Madisonville, 2-8-1919.

"Received from L. P. Levee, subject to the classification and Tariffs in effect on the date hereof, 1 Trunk—100 lbs., value herein declared by shipper to be — Dollars,

(See foot note.)

consigned to L. P. Levee at Thibodaux, La., charges "collect," which the company agreed to carry upon the terms and conditions printed on the back hereof, to which the shipper agrees, and as evidence thereof accepts and signs this receipt."

16 (The receipt is signed by the agent of the Company at the point of shipment but does not appear to be signed by the shipper.)

"NOTE.—The Company's charges, except upon ordinary live stock, is dependent upon the value of the property, as declared or released by the shipper. If the shipper desires to release the value to $50.00 for any shipment of 100 pounds or less, or not exceeding 50 cents per pound, actual weight, for any shipment in excess of 100 pounds, the value may be released by inserting "not exceeding $50.00 or not exceeding fifty cents per pound," in which case the Company's liability is limited to an amount not exceeding the value so declared or released."

On the back of the receipt appears, among others, the following terms and conditions, to-wit:

"2. In consideration of the rate charged for carrying said property which is dependent upon the value thereof and is based upon an

agreed valuation of not exceeding fifty dollars for any shipment of 100 pounds or less, and not exceeding fifty cents per pound, actual weight, for any shipment in excess of 100 pounds, unless a greater value is declared at the time of shipment, the shipper agrees that the Company shall not be liable in any event for more than $50.00 for any shipment of 100 pounds or less or for more than fifty cents per pound, actual weight for any shipment weighing more than 100 pounds, unless a greater value is stated herein. Unless a greater value is declared and stated herein the shipper agrees that the value of the shipment is as last above set out, and that the liability of the Company shall, in no event, exceed such value."

17 "3. Unless caused by its own negligence or that of its agents, the Company shall not be liable for C. Loss of Money, bullion, bonds, coupons, jewelry, precious stones, valuable papers or other matter of extraordinary value, unless such articles are enumerated in the receipt."

It thus appears by said receipt that plaintiff did not declare or give the value of his trunk and its contents at the time of shipment, but accepted, though he did not sign it, the said receipt which stated the weight of the trunk to be 100 pounds. It also appears on the face of the receipt that defendant company will not pay over $50 in case of loss for any shipment in excess of 100 pounds unless a greater value is declared and charges for such greater value paid. And it further appears from said receipt that the rate chargeable for transporting property is dependent upon its value, and where no value is declared the rate is based upon an agreed valuation of not exceeding $50 for any shipment of 100 pounds or less.

Does this receipt, under the facts and circumstances of this case, limit defendant's liability to plaintiff for its failure to deliver said trunk, to the sum of $50.00?

Defendant's learned counsel contend that it does, and in support of their contention they cite a number of decisions of the Supreme Court of the United States which they claim is decisive of the question, and the only authority by which the issue herein can be determined. No reason is assigned for the latter contention, and I know of no reason why this case ca-not be decided according to the laws of this State. On the contrary, I believe that, as the case is presented, the laws of this State govern and provide the only authority for determining the issue presented.

18 Defendant's learned counsel lay great stress upon the statement of plaintiff to the effect that the trunk was "lost," and, as a result, they assume that defendant is without further ado relieved of all liability, except to the amount limited in the said receipt. As already stated, all the plaintiff meant by this statement was that the trunk was "lost" to him as he never received it from defendant. He could not know what became of it, and was not in a position to know, after the trunk was delivered to defendant's agent at Madisonville, Texas, for shipment to Thibodaux, La., and no one was in such position, except defendant and its agents.

But even, assuming that the trunk was "lost," defendant cannot escape liability for its loss, unless it does allege and prove that such loss has been occasioned by accidental and uncontrollable events. This fact, if true, is peculiarly within the knowledge of the defendant and its agent, and no one else, and the law imposes the burden of proof upon it.

This is the law as laid down in Article 2754 of the Revised Civil Code, which reads as follows:

"Carriers and watermen are liable for the loss or damage of goods entrusted to their care, unless they can prove that such loss or damage has been occasioned by accidental and uncontrollable events."

This article clearly and emphatically places the burden of proof upon defendant to show what become of the trunk, and if it were "lost" as defendant contends, plaintiff admits it was, then defendant must allege and prove that the loss was "occasioned by accidental and uncontrollable events, and this involves the proposition that
19 defendant must prove that it was free from fault.

Lehman v. Morgans La. & Texas R. R., 115 La. 1; Simms v. N. O. & N. E. R. R. 122 La., 268; National Rice Milling Co., v. N. O. & N. E. R. R., 132, La., 615.

In the last cited case the Supreme Court in passing upon this question of burden of proof says:

"The Code (Article 2754) clearly states that in order to be relieved from liability, the carrier must prove "that such loss or damage has been occasioned by accidental and uncontrollable event." (Page 646.)

Again, on page 649, it says:

"As relates to Adams Express Co., vs. Croninger, 226 U. S. 491; 33 Sup. Ct. 148, 57 L. Ed. on which reliance is placed, it does not appear that the rules of evidence have been changed by the interpretation laid down in that decision, so as to shift the burden and to have the effect of nullifying the Civil Code of this State upon the subject."

"The amendment known as the 'Carmack Amendment' invalidates the provisions of any state law nullifying contracts limiting the liability of a carrier for loss or damage to the agreed or declared value. The amendment is silent about evidence. There is a great difference between the "agreed" value of freight, as set forth in the bill of lading, to be accounted for in case of loss, and the onus of proof in case of loss of freight."

"We annex a copy of the amendment in the margin, containing all that there is upon the subject in the Federal Interstate Commerce law. Not one word expresses the intention of repealing the rule fixing onus of proof under state statutes."

20 "It therefore appears from the foregoing decision that the burden of proof was upon defendant to prove that, if the trunk was "lost," as this seems to be the theory of its learned counsel, such loss was "occasioned by accidental and uncontrollable events," and

that it occurred without negligence on defendant's part. This defendant has failed to do. It has offered no reason or explanation why the trunk has not been delivered to defendant. It has simply admitted plaintiff's allegations that the trunk was delivered to it for shipment and its failure to deliver to plaintiff at point of destination.

"Under these circumstances, is the Court to assume, as plaintiff's learned counsel contends it should, that defendant still has the trunk in its possession and refuses to deliver it on account of its value, preferring to keep it and pay the value as limited by the said receipt?

"If the Court were to assume, either that the trunk was lost through the negligence of defendant, or that defendant still has the trunk in its possession thereby converting it to its own use, the legal effect would be the same in so far as defendant's liability is concerned. It would be responsible in either cause for the value of the trunk, and therefore, the said receipt limiting defendant's liability to $50.00 would be of no avail to it.

"The defendant having failed to show the facts connected with its failure to deliver the trunk as it was bound to do, by pleading and proof, the Court will assume that the trunk was "lost," as this seems to be the theory of its learned counsel and is more in keeping with the probabilities of the case, and it will not impute to defendant's
21 agents the commission of a crime, and that it was so lost by the negligence of defendant. And, having "lost" the trunk under such circumstances, the conclusion is that defendant is responsible for its value. And, for the same reason, its liability extends to all the articles contained in the trunk, such as bonds, notes and valuable papers, even though such articles were not enumerated in the said receipt; the clause therein being without legal effect under the facts and pleadings in the case.

"My conclusion, therefore, is that defendant is not protected by said receipt, and must pay plaintiff the value of the trunk and its contents which, as already stated, is shown to be worth the amount claimed.

"For the foregoing reasons, and the law and the evidence being in favor of plaintiff and against defendant,

"It is therefore ordered, adjudged and decreed that plaintiff, Lucius P. Levee, do have and recover judgment against defendant, The American Railway Express Company, for the sum of Eight Hundred & Sixty Three & 75/100 Dollars, with legal interest from judicial demand) (December 11th, 1919), till paid and for all costs of suit.

"Thus done, read and signed in Chambers at Thibodaux, La., on this 1st day of October, A. D. 1921, by consent of parties."

(Signed) H. M. WALLIS, JR.,
Judge 20th Judicial District.

22 *Order of Appeal.*

State of Louisiana, 20th Judicial District Court, Parish of Lafourche.

No. 4977.

LUCIUS P. LEVEE

vs.

THE AMERICAN RAILWAY EXPRESS CO.

Let a Suspensive Appeal, and in the alternative, a Devolutive Appeal be granted defendant herein on its furnishing bond in the sum required by law for a suspensive appeal, and in the sum of Fifty ($50.00) Dollars for a Devolutive Appeal, conditioned according to law, returnable to the Honorable Court of Appeal, First Circuit of the State of Louisiana, on the 24th day of October, 1921.

This done and signed in chambers at Thibodeaux, La., on this 1st day of October, 1921.

(Signed) H. M. WALLIS, JR.,
Judge 20th Judicial District.

Appeal Bond.

20th Judicial Dist. Court, Parish of Lafourche, State of Louisiana.

No. 4977.

LUCIUS P. LEVEE

vs.

AMERICAN RAILWAY EXPRESS CO.

23 Know all men by these presents, that we, American Railway Express Company and National Surety Company, as surety, are held and firmly bound unto Philip J. Aucoin, Clerk of the Twentieth Judicial District Court, for the Parish of Lafourche, his successors, executors, administrators and assigns, in the sum of Two Thousand ($2,000.00) dollars for the payment which we bind ourselves, our heirs, our executors and administrators, firmly by these presents, dated in the City of New Orleans, on this 1st day of October, in the year of our Lord one thousand nine hundred and twenty-one.

Whereas, the above bounden American Railway Express Company has this day filed a motion of appeal from a final judgment rendered against it in solido in the suit of Lucius P. Levee, No. 4,977 of the Twentieth Judicial District Court for the Parish of Lafourche, on the 1st day of October, 1921, and signed on the 1st day of October, 1921.

Now the condition of the above obligation is such, that the above bounden American Railway Express Company shall prosecute its suspensive and devolutive appeal, and shall satisfy whatever judgment may be rendered against it, or that the same shall be satisfied by the proceeds of its estates, real or personal, if it be cast in the appeal; otherwise that the said National Surety Company shall be liable in its place.

Signed, sealed and delivered in the presence of Ruth M. Seiler and Robert E. Bell, competent witnesses.

AMERICAN RAILWAY EXPRESS COMPANY,
By A. A. MORENO,
Atty.
NATIONAL SURETY COMPANY,
By LOUIS COIRON,
Res. Vice President.

24 Attest:
LOUIS VALE,
Res. Asst. Secty.

Witnesses:
RUTH M. SEILER.
R. E. BELL.

Appeal costs paid $5.00.
J. P. FINNIN,
Clerk.

Opinion and Decree, Court of Appeal.

Court of Appeal, First Circuit, State of Louisiana.

L. P. LEVEE.

vs.

AMERICAN RAILWAY EXPRESS CO.

Appeal from Lafourche Parish.

Statement.

ELLIS, *J.*:

"The plaintiff sues the defendant for a trunk, its value, and the value of its contents. Plaintiff alleges that he delivered said trunk to the defendant at Madisonville, State of Texas, on the 8th day of February, 1919, to be shipped by it to him at Thibodaux, Louisiana. That the charges were to be paid at Thibodaux, for the reason that said agent at Madisonville told him that he did not know the rate which would apply, and said agent, at the same time, and for the same reason prevented him from making declaration of the value

of said trunk and its contents. Plaintiff further alleges failure of defendant to deliver said trunk to him at Thibodaux, although repeated demands had been made for same; that by said failure of defendant, said trunk and its contents were a total loss to him. Plaintiff alleges value of trunk and itemizes contents, and value of same, totaling $863.75, for which he prays judgment with interest.

The answer of the defendant admits its receipt of the trunk, and its failure to deliver. It denies value, and that plaintiff was prevented by its agent from making declaration of the value of the trunk and its contents. It sets up as a special defense that its li-bility was limited by the contract contained in the receipt given by its agent, to fifty dollars.

"The trial in the District Court resulted in judgment for plaintiff, and the defendant prosecutes its appeal to this Court.

Opinion.

"The defendant having admitted its receipt of the trunk for shipment to Thibodaux, and its failure to deliver same, was in duty bound to show by its pleadings and proof, what disposition it had made of same.

"Yet, strange to say, there is neither allegation, nor proof, of such fact. The Article 2754 of our Civil Code says: "Carriers and Watermen are liable for the loss or damage of goods entrusted to their care, unless they can prove that such loss or damage has been occasioned by accidental, and uncontrollable events." Lehman vs. Morgan, La. & Tex. R. R., 115 La. 1. Sims vs. N. O. & N. E. R. R., 112 La. 268. In Natl. Rice Milling Co. vs. N. O. & N. E. R. R., 132 La. 615, the Supreme Court held that the Carmack Amend-
26 ment did not change the rules of evidence, or the burden of proof in like cases to this. The defendant having admitted the receipt of plaintiff's trunk, and failure to deliver it, and having failed to allege and prove that same was lost accidentally or by some uncontrollable event, is equivalent to an admission of converting it to its own use. If the defendant had been an individual, and on trial before the District Judge on the charge of embezzling plaintiff's trunk and its contents, under the same admissions and facts presented in this case, no other verdict than that of guilty as charged, could have been legally rendered. This being so, the defendant's special plea, that it can only be held liable for $50.00, the limitation of liability as set forth in the receipt it gave defendant, must fall. To say otherwise, would violate all principles of honesty, justice and law. Corpus Juris, Vol. 10, p. 168, lays down the rule that "Stipulations limiting the carrier's liability for loss or injury to an agreed valuation, have no application in case of the conversion of the goods by the carrier." This rule has been upheld in Georgia So. Ry. Co. vs. Johnson, 121 Ga. 231-233; 48 S. E. Reporter, 807; Feseler vs. Detroit Taxicab Co. 5th A. L. R. 171; N. W. R. 360, and quite a number of other cases cited in plaintiff's brief.

"The testimony as to value of plaintiff's trunk and its contents is uncontradicted. The judgment appealed from is affirmed with costs."

Baton Rouge, Louisiana, January 31st, 1922.

Court of Appeal, First Circuit, State of Louisiana. Parish of Lafourche.

27 *Petition for Rehearing.*

Court of Appeal, First Circuit, State of Louisiana.

No. —.

LUCIUS P. LEVEE

versus

AMERICAN RAILWAY EXPRESS COMPANY.

The petition of American Railway Express Company, defendant and appellant herein, with respect represents:

I.

That your Honorable Court on January 31st, 1922, rendered an opinion in this matter affirming the judgment of the lower Court in favor of the plaintiff. Your petitioner represents that the judgment of your Honorable Court is contrary to the law and the evidence and that your petitioner is entitled to a rehearing for the following reasons, to-wit:

II.

Your petitioner represents that this is a contract of interstate shipment from Madisonville, Texas, to Thibodaux, Louisiana, and is therefore subject to the rights created by the laws of the United States governing interstate commerce and to the interpretation of such laws by the Federal Judiciary.

III.

That under the laws of the United States and the decisions of the Supreme Court of the United States in numerous cases, it is
28 provided that every shipment in interstate commerce gives rise to a contract subject to the rules and limitations of federal statutes and decisions. See Adams Express Company vs. Croninger, 226 U. S. 491.

IV.

Your petitioner represents that the contract in evidence limits the liability of your petitioner to Fifty ($50.00) dollars in cases of loss

or damage to the shipment in question and that this limitation of liability is based upon a lower rate charged for the shipment; and that, although the charges were to be collected at Thibodaux, nevertheless your petitioner was entitled to collect only the lawful rate provided for in the tariff filed herein and that because of its right to collect only the lower rate, it is entitled to claim the limitation of liability provided for in said contract.

V.

Your petitioner represents that the stipulations for a limitation of liability have been heretofore upheld in many cases decided by the Supreme Court of the United States. See Adams Express Company vs. Croninger, 226 U. S. 491; Kansas City Southern Railway Company vs. Carl, 227 U. S. 639; M. K. & T. R. R. vs. Harriman, 227, U. S. 657; Boston & Maine vs. Hooker, 233 U. S. 97.

VI.

Your petitioner represents that this right to claim the limitation of liability provided for in the contract herein sued upon is a federal right guaranteed to it by the United States Constitution and
29 the Acts of Congress and that the decision of this Honorable Court is a denial of such right and will necessitate an appeal by your petitioner to the Supreme Court for a writ of certiorari and, if denied, then to the United States Supreme Court for a writ of certiorari and a writ of review, with consequent loss to plaintiff if petitioner is successful, and that because of the importance of the principle herein involved and the consequent loss to the parties litigant that this case is of sufficient importance to grant a rehearing herein to the end of correcting such error, if any exists, in the opinion and decree of this Honorable Court.

Wherefore, your petitioner prays that this Honorable Court grant a rehearing herein and apply the cited cases to a determination of this cause, as the matter involves a federal right.

Respectfully submitted,

HUNTER C. LEAKE,
ARTHUR A. MORENO,
Attorneys, Petitioner.

Filed Feby. 6th, 1921.

DEWEY SANCHEZ,
Clerk.

30 *Minutes Refusing Rehearing.*

No. —.

L. P. LEVEE

vs.

AMERICAN RAILWAY EXPRESS CO.

On Application for a Rehearing.

Rehearing refused.
Baton Rouge, Louisiana, Feby. 11th, 1922.

JULIAN MOUTON,
STEPHEN D. ELLIS,
PAUL LECHE,
Judges.

Filed Feby. 11, 1922.
D. J. SANCHEZ,
Deputy Clerk.

Filed Feb. 18, 1922.
P. J. FINNIN,
Clerk.

Plaintiff's Petition.

To the Honorable Twentieth Judicial District Court of the State of Louisiana in and for the Parish of Lafourche:

This, the petition of Lucius P. Levee, now a resident of Ferriday, in the Parish of Concordia, Louisiana, for cause of action against The American Railway Express Company, a common carrier corporation, doing business in Louisiana, Texas and other states, and having in Louisiana, a duly designated agent for service of process, alleges and avers:

31 I.

That said American Railway Express Co. was on the 8th day of February, 1919, and has been ever since engaged in the business of Common Carrier, as an Express Co. in Louisiana, Texas & other states.

II.

That on the 8th day of February, 1919, petitioner delivered to the duly authorized agent of said American Railway Express Co. at its express office at Madisonville, Texas, one trunk, weighing One Hundred pounds or less, for safe shipment and carriage by said Express Co. to petitioner at Thibodaux, Louisiana.

III.

That said trunk was duly addressed and consigned to Petitioner L. P. Levee, at Thibodaux, La., as will more fully appear by the original receipt of said Express Co., which is hereto annexed and made part hereof.

IV.

That said trunk was shipped "collect", that is to say that the carriage charges were to be paid upon delivery at Thibodaux, La.

V.

That said trunk was shipped "collect" for the reason that the said agent of said company at Madisonville, Texas, told Petitioner that he did not know the rate which would apply:

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VI.

And said agent at the time of receipt by him of said trunk, prevented Petitioner from making declaration of the value of said trunk and its contents, for the said reason, as he then and there said, that he did not know the rate which would apply.

VII.

That said trunk has never been delivered by said Express Co. to Petitioner, at Thibodaux, La., or at any other place, in spite of due demand made by Petitioner.

VIII.

That said trunk and all of its contents, by reason of the refusal and failure of said Express Co. to deliver same to Petitioner, has been and is a total loss to Petitioner.

IX.

That said trunk was a wooden trunk, about 36 inches by 24 inches by 20 inches in size, and was leather strapped locked and sealed.

X.

And was worth the sum of Twelve Dollars. $12.00.

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XI.

That said trunk contained, at the time it was delivered to said Express Company as aforesaid, the following articles, each worth the amounts set opposite to them, to-wit:

(1)	One blue lounging robe, silk lined, worth Ten Dollars	$10.00
(2)	One pair leather slippers, worth Two & 50/100 Dollars	2.50
(3)	One pair, red bed-room slippers, worth Two Dollars.	2.00
(4)	One pair leather lace shoes (old) worth Two Dollars.	2.00
(5)	One suit of clothes, black, worth Fifteen Dollars....	15.00
(6)	Four silk shirts, worth Twenty Dollars.....	20.00
(8)	Two silk night shirts, worth Fifteen Dollars	15.00
(7)	Four silk shirts, worth Ten Dollars.....	10.00
(9)	Two pairs of pajamas, worth Ten Dollars.....	10.00
(10)	Eight pairs of socks, silk, worth Five Dollars.....	5.00
(11)	One dozen ties, worth Five Dollars.....	5.00
(12)	One straw hat, worth Three Dollars.....	3.00
(13)	Three felt hats, worth Twelve Dollars.....	12.00
(14)	One china cigar bowl (cover broken) worth Two Dollars	2.00
(15)	Reed collar box, worth One Dollar	1.00
(16)	One Leather covered Kodak, worth Twenty Dollars..	20.00
(17)	Search light, worth One Dollar.....	1.00
(18)	Reading magnifying glass, worth fifty cents.....	.50
(19)	Two Razor straps worth Two Dollars.....	2.00
(20)	One Razor, worth Three Dollars.....	3.00
(21)	Three safety razors, worth Five Dollars.....	5.00
(22)	One Hone, worth fifty cents.....	.50
(23)	One Bible, worth fifty cents.....	.50
(24)	One testament, worth fifty cents.....	.50
(25)	One jewelry casket, worth Two Dollars	2.00

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(26)	One Gold ring, worth Five Dollars.....	5.00
(27)	Four shirt Buttons, worth Two Dollars.....	2.00
(28)	One Gold Chain, worth Eight Dollars.....	8.00
(29)	One Stick Pin, worth Two Dollars.....	2.00
(30)	One Gold filled watch, and filled chain, $15.00.....	15.00
(31)	One pair tortoise shell rimmed eye-glasses.....	5.00
(32)	One pair gold spectacles, worth Eight Dollars.....	8.00
(33)	One small gold handled knife, worth $2.50.....	2.50
(34)	One white handled military hair brush worth.....	1.00
(35)	One clothes brush, worth 25 cts.....	.25
(36)	One Thermometer, worth One Dollar.....	1.00
(37)	One Framed Picture, worth One Dollar.....	1.00
(38)	One Silver match case, worth One & 50/100 Dollars.	1.50
(39)	One Bank Box, worth Two & 50/100 Dollars.....	2.50

XII.

Said Bank Box contained, locked therein, the following, which are worth the amounts specified and are a total loss to Petitioner, to-wit:

(1) United States War Savings and Thrift Stamps to the amount of Fifty Dollars, worth now, $44.00..... $44.00
(2) One Liberty Bond, First Issue, for Fifty Dollars, worth that sum 50.00
(3) One Liberty Bond, Second Issue, for Fifty Dollars, worth that sum 50.00
(4) One Liberty Bond, Third Issue, for One Hundred Dollars, worth that sum..... 100.00

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(5) Two Liberty Bonds, Fourth Issue, for Fifty Dollars each, worth together $200.00..... 200.00
(6) Three Liberty Bonds, Fourth Issue, for Fifty Dollars each, worth together, $150.00..... 150.00

XIII.

That the accumulated interest on said Liberty bonds amounting to the sum of Thirty Dollars, is also a complete loss to Petitioner $30.00

XIII.

That Petitioner also lost with said Bank box, six promissory notes of $1,000.00 each secured by mortgage and vendor's privilege on five lots in the City of Baton Rouge, and that it cost Petitioner Fifteen Dollars to have said notes replaced by new ones..... $15.00

XIV.

Also shows that he lost with said Bank box, four promissory notes of $800.00 each secured by mortgage and vendor's privilege on property in Rapides Parish, and that it cost Petitioner Fifteen Dollars to have said notes replaced by new ones $15.00

XV-A.

Further shows that he lost in said Bank box, certificates for two shares of stock in the Gretna Exchange & Savings Bank, and that it cost Petitioner Two Dollars to make the necessary affidavits, etc., to have said certificates replaced by a new one..... $2.00

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XVI-A.

Further shows that he lost with said Bank box, three policies of insurance on his life, and that it cost petitioner, One & 50/100 Dollars to have new policies issued to him in place of the ones lost $1.50

XVII-A.

Petitioner further shows that his total loss from the failure and refusal of said American Railway Express Co. to deliver said trunk to him is the sum of ($863.75) Eight Hundred & Sixty-three & 75/100 Dollars, as hereinbefore detailed, for which sum Petitioner is entitled to judgment against said Express Company.

Wherefore Petitioner prays that said American Railway Express Company, be duly cited, through its lawful agent, to appear and answer this petition, and that after legal delays and due proceedings, said American Railway Express Co. be condemned to pay to Petitioner the said sum of Eight Hundred & Sixty-three & 75/100 Dollars, with legal interest from judicial demand until paid, and all costs of these proceedings. And Petitioner prays for all general and equitable relief in the premises.

HOWELL, WORTHAM & GIONELLONI,
HOWELL, WORTHAM & HOWELL,
Attorneys for Petitioner.

Verification.

Chas. T. Wortham, having been duly sworn says:

"I am one of the Attorneys for the Petition- in the foregoing petition. I wrote the foregoing petition, and made all the allega-
37 tions of fact therein contained, from the best information, I could obtain, and as to all of said allegations of fact, I believe them to be true."

CHAS. T. WORTHAM.

Sworn to and subscribed before me in the Parish of Assumption, the 12th day of November, Nineteen Hundred & Nineteen.

AUBERT L. TALBOT,
Notary Public.

Advance costs paid $5.00.

P. J. AUCOIN,
Clerk.

Uniform Express Receipt Attached to and Made Part of Petition.

LUCIUS P. LEVEE

versus

THE AMERICAN RAILWAY EXPRESS CO.

American Railway Express Co.

Non-negotiable Receipt.

Madisonville, 2/8, 1919.

Received from L. P. Levee subject to the classifications and tariffs in effect on the date hereof 1 trunk—100 lbs., value herein declared by shipper to be (Blank) dollars.
Consigned to L. P. Levee, at Thibodaux, La.
Charges, Collect, War Tax, —.

W. R. LATENDALL,
For the Company.

38 NOTE.—The company's charge, except upon ordinary live stock, is dependent upon the value of the property, as declared or released by the shipper. If the shipper desires to release the value to $50 for any shipment of 100 pounds or less, or not exceeding fifty cents per pound, actual weight, for any shipment in excess of 100 pounds, the value may be released by inserting "not exceeding $50," or "not exceeding fifty cents per pound," in which case the company's liability is limited to an amount not exceeding the value so declared or released.

Terms and Conditions.

1. The provisions of this receipt shall enure to the benefit of and be binding upon the consignor, the consignee, and all carriers handling this shipment, and shall apply to any reconsignment, or return thereof.

2. In consideration of the rate charged for carrying said property, which is dependent upon the value thereof and is based upon an agreed valuation of not exceeding fifty dollars for any shipment of 100 pounds or less, and not exceeding fifty cents per pound, actual weight, for any shipment in excess of 100 pounds, unless a greater value is declared at the time of shipment, the shipper agrees that the company shall not be liable in any event for more than fifty dollars for any shipment of 100 pounds or less, or for more than fifty cents per pound, actual weight, for any shipment weighing more than 100 pounds, unless a greater value is stated herein. Unless a greater value is declared and stated herein the shipper agrees that the value of the shipment is as last above set out and that the liability of the company shall in no event exceed such value.

39 3. Unless caused by its own negligence or that of its agents, the company shall not be liable for—

a. Difference in weight or quantity caused by shrinkage, leakage, or evaporation.

b. The death, injury, or escape of live freight.

c. Loss of money, bullion, bonds, coupons, jewelry, precious stones, valuable papers, or other matter of extraordinary value, unless such articles are enumerated in the receipt.

4. Unless caused in whole or in part by its own negligence or that of its agents, the company shall not be liable for loss, damage, or delay caused by—

a. The act or default of the shipper or owner.

b. The nature of the property, or defect or inherent vice thereof.

c. Improper or insufficient packing, securing or addressing.

d. The Act of God, public enemies, authority of law, quarantine, riots, strikes, perils of navigation, the hazards or dangers incident to a state of war, or occurrence in customs warehouse.

e. The examination by, or partial delivery to, the consignee of C. O. D. shipments.

f. Delivery under instructions of consignor or consignee at stations where there is no agent of the company after such shipments have been left at such stations.

40 5. Packages containing fragile articles or articles consisting wholly or in part of glass must be so marked and be packed so as to insure safe transportation by express with ordinary care.

6. When property is destined to a point at which no express company has an agency it should be marked with the name of the express station at which delivery will be accepted. If not so marked it will be carried to the express station nearest the destination point and arrival notice given consignee.

7. Except where the loss, damage, or injury complained of is due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, as conditions precedent to recovery claims must be made in writing to the originating or delivering carriers within four months after delivery of the property or in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed; and suits for loss, damages, or delay shall be instituted only within two years and one day after delivery of the property or, in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed.

8. If any C. O. D. is not paid within thirty days after notice of non-delivery has been mailed to the shipper the Company may at its option return the property to the consignor.

9. Free delivery will not be made at points where the company maintains no delivery service; at points where delivery service is maintained free delivery will not be made at addresses beyond the established and published delivery limits.

41 Special Additional Provisions as to Shipments Forwarded from the United States to Places in Foreign Countries.

10. If the destination specified in this receipt is in a foreign country, the property covered hereby shall, as to transit over ocean routes and by their foreign connections to such destination, be subject to all the terms and conditions of the receipts or bills of lading of ocean carriers as accepted by the company for the shipment, and of foreign carriers participating in the transportation, and as to such transit is accepted for transportation and delivery subject to the acts, ladings, laws, regulations and customs of over-sea and foreign carriers, custodians, and governments, their employees and agents.

11. The company shall not be liable for any loss, damage, or delay to said shipments over ocean routes and their foreign connections, the destination of which is in a foreign country, occurring outside the boundaries of the United States, which may be occasioned by any such acts, ladings, laws, regulations, or customs.

12. It is hereby agreed that the property destined to such countries, and assessable with foreign governmental or customs, duties, taxes, or charges, may be stopped in transit at foreign ports, frontiers or depositories, and there held pending examination, assessments, and payments, and such duties and charges, when advanced by the Company, shall become a lien on the property.

42 *Citation.*

State of Louisiana, 20th Judicial District Court, Sitting in and for the Parish of Lafourche.

No. 4977.

LUCIUS P. LEVEE

vs.

THE AMERICAN RAILWAY EXPRESS COMPANY.

To the American Railway Express Company, through its proper officer residing in the City of New Orleans, Louisiana.

You are hereby summoned to comply with the prayer of the petition, a true and faithful copy whereof accompanies this citation, or

file your answer thereto, in writing with the Clerk of said Court at his office in the town of Thibodaux, ten days after the service hereof, adding one day for every ten miles your residence is distant from the place of holding said Court in the Town of Thibodaux. Provided, the delay in no case shall exceed fifteen days in all.

Witness Honorable H. M. Wallis, Jr., Judge of said Court. Granted under the impress of the seal of said Court, and my official signature this the 10th day of the month of Dec., 1919.

[SEAL.] P. J. FINNIN,
Clerk.

20th Judicial Dist. Court, Lafourche Parish.

43 No. 4977.

LUCIUS P. LEVEE

vs.

THE AMERICAN RAILWAY EXPRESS COMPANY.

Howell, Wortham & Howell, Attys.

On the 11th day of December, 1919, served a copy of the within Citation and accompanying petition on American Railway Express Company, defendant herein in Parish of Orleans, State of Louisiana by personal service on E. W. Tate, its duly authoried agent.

Returned same day.

JOHN E. VILLA,
Deputy Sheriff of Orleans Parish.

Sheriff's Fees, —.

Filed March 6, 1920.
P. J. FINNIN,
Clerk.

Answer of Defendant.

20th Judicial District Court, Lafourche Parish, Louisiana.

No. 4977.

LUCIUS P. LEVEE

vs.

AMERICAN RAILWAY EXPRESS COMPANY.

Now into Court, through its undersigned counsel, comes American Railway Express Company, and for answer to plaintiff's petition, avers:

I. Respondent admits it is a common carrier engaged in the transportation of goods in Louisiana, Texas and other states, and that it has an agent duly appointed for the service of process.

44 II. Respondent admits the allegations of paragraph 2 of plaintiff's petition.

III and IV. Respondent admits the allegations of paragraphs 3 and 4 of plaintiff's petition.

V. Respondent for want of information and belief denies the allegations of paragraph 5 of plaintiff's petition.

VI. Respondent denies the allegations of paragraph 6 of plaintiff's petition.

VII, VIII and IX. Respondent admits the allegations of paragraphs 7, 8 and 9 of plaintiff's petition.

X. Respondent for want of information and belief denies the allegations of paragraph 10 of plaintiff's petition.

XI. Respondent for want of information and belief denies the allegations of paragraph 11 of plaintiff's petition.

XII. Respondent for want of information and belief denies the allegations of paragraph 12 of plaintiff's petition; and further answering respondent avers that even if said allegation is true and correct, plaintiff is not entitled to recover therefor because under the terms and conditions of said contract it is specially declared that the liability of respondent shall be limited to the sum of Fifty ($50) Dollars unless a greater value is declared and a proportionate rate paid therefor. Your respondent denies that any value was declared and a greater rate paid therefor. Your respondent
45 further avers that under its said contract it is specifically provided that "unless caused by it- own negligence or that of its agents the Company shall not be liable for loss of money, bullion, bonds, coupons, jewelry, precious stones valuable papers or other matter of extraordinary value unless such articles are enumerated in the receipt," and respondent avers that said articles were not so enumerated in the receipt which formed the contract between plaintiff and respondent.

XIII. Respondent for want of information and belief denies the allegations of the two paragraphs numbered 13 in plaintiff's petition.

XIV. Respondent for want of information and belief denies the allegations of paragraph 14 of plaintiff's petition.

XV, XVI and XVII. Respondent for want of information and belief denies the allegations of paragraphs 15, 16 and 17 of plaintiff's petition.

Wherefore respondent prays that plaintiff's suit be dismissed at plaintiff's costs; and for general and equitable relief.

HUNTER C. LEAKE,
ARTHUR A. MORENO,
Attorneys for Defendant.

Affidavit.

Before me, the undersigned authority, personally appeared A. A. Moreno, who, being duly sworn, deposed and said, That he is of counsel for defendant; that the president, vice-president and
46 others officers of defendant authorized to make oath hereto are absent from the State; that he has read the foregoing answer and all the allegations therein made are true and correct to the best of his information and belief.

A. A. MORENO.

Sworn to and subscribed before me, this 24th day of December, 1919.

[SEAL.] H. L. LOOMIS, JR.,
Notary Public.

Filed Dec. 26, 1919.

P. J. FINNAN,
Clerk.

Twentieth Judicial District Court, Parish of Lafourche.

No. 4977.

LUCIUS P. LEVEE, Plaintiff,

vs.

THE AMERICAN RAILWAY EXPRESS CO., Defendant.

E. J. GIANELLONI,
C. J. BOURG,
HOWELL, WORTHAM & HOWELL,
Attorneys for Plaintiff.
A. A. MORENO,
Attorney for Defendant.

Filed Oct. 31, 1921.

DEWEY J. SANCHEZ,
Clerk.

Date of Filing Oct. 13, 1919.

47 20th Judicial District Court, Parish of Lafourche, State of Louisiana.

No. 4977.

LUCIUS P. LEVEE

vs.

THE AMERICAN RAILWAY EXPRESS COMPANY.

Testimony and Notes of Evidence Taken in the Above Numbered and Entitled Cause Before the Honorable H. M. Wallis, Judge of said Court, on Friday, June 11, 1920.

Appearances: Messrs. Howell, Wortham & Howell, (Chas. T. Wortham, Esq.,) for the Plaintiff.

Mr. Wortham: Your Honor, I do not like to go into a case in the absence of opposing counsel. I have a letter here from Mr. Moreno stating he would be present. (Reading letter.) He knows that the case is fixed for today, and we would like to proceed with the trial, if Your Honor please.

The Court: Proceed.

Mr. Wortham: We would like to leave the case open for four or five days to permit counsel to offer any evidence he desires to.

The Court: Yes, sir.

48 L. P. LEVEE was sworn and testified as follows:

Direct examination.

(By Mr. Wortham:)

Q. You are the plaintiff in this case?

A. I am.

Q. Your name is Lucius P. Levee?

A. Yes, sir.

Q. Tell us the circumstances under which you shipped this trunk?

A. I was called to Texas on business affairs, and on completing these affairs February 8th, I had a box,—bank box, containing valuables, notes, bonds,—

Q. I think you are going too much into detail. Tell us what occurred at the Express Office.

A. I offered my trunk to the Express Office; I told the agent I wanted to express it to Thibodeaux, and he says, "Why don't you just check it?" And I said "No, I have some valuable papers and other valuables in the trunk, and I do not want to take a chance on having it lost as baggage; I want it expressed to Thibodeaux, and I want you to seal the trunk up and ex-

press it." The agent stated that he did not know the rate, could not apply a rate on it; he would ship it, and for me to pay when it got to this end of the road, whatever the rate would be; and he gave me a receipt; he would not accept any amount; wanted me to pay at Thibodeaux. I cautioned him very emphatically in regard to sealing the trunk. I did not want anybody to go into it, because the papers and valuables were in there, and bonds and things in my bank box. I never have seen the trunk from that time to this. I took the receipt and got on the train and left.

Q. Did you offer to declare the value of the trunk?

49 A. I just told him there were valuables in it; I do not know that I mentioned any amount; I told him I had valuable papers and valuables in the trunk. He did not ask me the value.

Q. What would you have valued that trunk at?

A. At about $1,000 or $1,500, if he had asked me the value. I did not want to send it by baggage because as baggage it would not have been accepted at a valuation over about $150. I could have checked it out of there, but I did not want to take any chances; that is the reason I wanted it sealed and sent by express.

Q. What was in the trunk?

A. Would you like for me to enumerate everything?

Q. Yes; you better do that.

A. The new wooden trunk, I valued that at $12, and then the contents was, a blue silk lounging robe, $10, pair of leather slippers, value $2.50, a pair of bedroom slippers, $2, pair of shoes,—old lace shoes, $2, suit of clothes that had been worn some, I valued at $15, and I had four or five silk shirts in there that had been worn, but very little, valued at $20. I had four or five ordinary shirts valued at $10; I had two or three silk nightshirts, $15, and I had two or three pairs of pajamas at $10; eight or ten pairs of socks, silk and plain, valued at $5; about a dozen ties at $5; straw hat at $3, three felt hats, $12, China Square Bowl I valued at $2, Reed Collar Box at $1, a leather covered kodak $20; a search light at $1, and a reading magnifying glass 50 cents; two razor straps at $2, one razor at $3, and three safety razors at $5; hone at 50 cents, bible at 50 cents, testament at 50 cents; a jewelry casket was tied up and contained a solid gold ring value $5, four gold shirt buttons $2, a gold chain at $8, an initial stick pin at $2, one gold-filled watch and chain

50 at $15, tortoise-shell eye-glasses $5, pair of gold spectacles $8, small gold-handled knife, $2.50; one white military hair brush $1, one clothes brush 25 cents, thermometer $1, frame picture,—woman's picture—$1, silver match case $1.50. I can now give you the contents of this bank box. The bank box contained a thrift stamp book with $50 worth of thrift stamps, and one liberty bond, first issue $50, a liberty bond second issue $50, a liberty bond third issue $100, a liberty bond fourth issue $100, another liberty bond fourth issue $50, another liberty bond fourth issue $50, and another liberty bond fourth issue at $50. These bonds had accumulated interest coupons amounting to $23.40 at that time. Besides this, in this box was a lot of rent notes. Shall I enumerate them?

Q. Well, you recovered on those, did you not?

A. Yes, sir. I'll not put them in. I had some mortgages on which I had to go to the expense of having re-issued. I had six vendor lien notes on some lots in Baton Rouge which cost me $15 to have renewed, in the next issue.

Q. In the place of those you lost?

A. Yes, sir; and I had mortgage notes on 107 acres in Rapides Parish that cost me $15. I had two shares of Gretna Exchange Savings Bank Stock that cost me $2 to have replaced. And I had a life insurance policy, and I had two life insurance policies that cost me 50 cents apiece, and one in the Railroad Conductors that cost me 50 cents to get reissued. Those other things were paid that I had in there.

Q. Now, you do not put a value on that bank box itself?

A. Bank box at $2.50.

Q. $12 was the trunk?

A. Yes, sir, and $2.50 on the bank box.

The Court:

Q. Making a total of what?

51 Mr. Wortham: $863.73.

Q. Are you sure all these articles you have enumerated were in that trunk?

A. Yes, sir; I am.

Q. You have been testifying from a memorandum. When did you make that memorandum?

A. Shortly after I applied at the Southern Pacific Office and found the trunk was lost, I made up a memorandum of it, of the contents, and started to trying to trace it up and recover it.

Q. How did you know it was lost,—they refused to deliver it you mean?

A. Yes. As soon as they refused to deliver it to me.

Q. Is this value that you place on these articles a reasonable value?

A. Yes, sir.

Q. Are you positive of it?

A. I could not buy them at anything like the value I have put on them.

Q. Are you satisfied these values are low?

A. Yes, sir; they are lower than they could be replaced for now.

Q. You did not put a value on the jewelry casket, I notice.

A. $2 on the casket.

Q. You said just now something about valuing the trunk at a thousand dollars or over, why would you have done that since you are suing for only $863.75?

A. At the time I had a lot of land notes in the bank box, and they were afterwards paid.

Q. Those notes were afterwards paid?

A. Yes, sir; and I gave them a release for those notes.

Q. You are not suing for those notes on which you have recovered?

52 A. No, sir.

Q. And these amounts you have stated that it cost you to have new notes in place of the old ones, that is what it actually cost you?

A. Yes, sir; that is the actual cost of them.

Mr. Wortham: Your Honor, that is all we can do today. We will just rest the case.

The Court: The Court will be in session at Houma beginning Monday for three weeks.

Mr. Wortham: We might come over there and finish the case?

The Court: Yes, most any day.

By Mr. Moreno: Counsel for defendant offers produces and files in evidence the uniform receipt of the American Railway Express Co., dated February 8, 1919, and attached to the petition of the plaintiff, being the receipt or contract upon which suit has been filed.

Admission.

It is admitted that the receipt attached to the petition is the uniform receipt of the American Railway Express Co. and that it has been filed with and approved by the Interstate Commerce Commission.

53 Mr. JOHN MCCULLAM, being duly sworn on behalf of the defendant, says:

Q. What is your occupation?

A. Agent at Thibodaux.

Q. How long have you been connected with the Express Company?

A. About eight years.

Q. Are you familiar with the rules and classifications of the American Railway Express Co.?

A. Yes, sir.

Q. Were you familiar with the rules and classifications of the American Railway Express Company during February, 1919?

A. Yes, sir.

Q. Is there any rule regarding the shipment of jewelry, diamonds, precious stones, money, bullion?

A. It should be sealed and contents marked on outside of the package.

Admission.

It is admitted that under the freight classification filed by the American Railway Express Co. with the Interstate Commerce Commission and approved by the Interstate Commerce Commission, that under the heading of "Rules for Receiving Shipments," in subsection "G," it is provided that shipment of jewelry, diamonds or other precious stones, money bullion, bonds, coupons, watches or valuable papers will not be accepted for shipment in packages con-

taining ordinary merchandise, unless such articles are described in the uniform express receipt, as shipments of this character are transported by the Express Company only through a special department. In case of loss of any of the articles above mentioned, when shipped with other merchandise, the Express Company will
54 not be liable except for its own negligence, unless such articles are described in the uniform express receipt.

Q. Mr. McCullom, do bonds take a higher rate than clothes and ordinary merchandise?

A. Merchandise is higher.

Q. I show you here a receipt attached to this petition in which the shipment is declared as one hundred pounds, Suppose there had been no declaration of one hundred pounds, would that have taken a higher rate or a lower rate?

A. It has to go by the weight, for we charge by the weight.

Q. Can you tell me the rate from Madisonville, Tex., to Thibodaux, La., on the basis of a trunk of one hundred pounds?

A. The rate at that time was $2.69 per one hundred pounds on merchandise and on the bonds 74 cents. The trunk value does not show, any value, what he claims should be the value.

Q. How much would the rate have been figured on that shipment, as it appears in the receipt?

A. $2.83.

Q. $2.83?

A. Yes, sir.

Q. Suppose that the value of the goods shipped had been declared to be $845.45, what would have been the express rate from Madisonville, Tex., to Thibodaux?

A. Would that mean bonds or just merchandise.

Q. Suppose, let us take it that he had declared the value of the contents of that trunk to have been $845.25, what would have been the rate?

A. This rate would have been $2.83 and 90 cents valuation.

Q. What do you mean by $2.83 and 90 cents valuation?
55 A. That is express charge and the valuation is to be included. That is different from the merchandise.

Q. Do you mean that it would have to be added to?

A. Added to—a total of $3.72.

Q. So that if he had declared a valuation of $845.25 he would have paid a higher rate than he would have paid on the shipment as it was made?

A. Yes, sir.

Cross-examination.

(By Mr. Wortham.)

Q. When this trunk arrived in Thibodaux, if it had arrived in Thibodaux, what would you have charged Mr. Levee for transporting the trunk from Madisonville, Tex., to Thibodaux?

A. I would have charged him according to the way it was billed, declared under his valuation. I could not charge any more for the actual weight of the trunk.

Q. Would it not have been your duty to ask the whole valuation?

By Mr. Moreno: I object to that as calling for the opinion of the witness.

By the Court: The Court overrules the objection.

A. It would have been my duty to ask him. But the contract is not signed by the shipper. He didn't bring the trunk. Of course, there was no valuation. He should have read his receipt.

Q. This receipt states, does it not, that the charges would have to be collected at Thibodaux, La.?

A. Yes, sir.

56 Q. Was it not the duty of the agent at Thibodaux, La., to collect such charges as are imposed by the Interstate Commerce Commission?

A. The valuation ought to be marked on the packages by the shipper.

Evidence closed.

Interstate Commerce Commission,

Washington.

I, George B. McGinty, Secretary of the Interstate Commerce Commission, do hereby certify that the schedules hereto attached, and more particularly hereinafter described, are true copies of schedules filed with the said Interstate Commerce Commission on dates specified below, to-wit:

American Railway Express Company Adoption Notice, I. C. C. No. 1, filed June 29, 1918; said I. C. C. No. 1 having been in force on February 9, 1919.

American Railway Express Company Official Express Classification No. 26, I. C. C. No. 150, filed August 22, 1918; said I. C. C. No. 150 having been in force on February 9, 1919, as amended by supplement No. 1 thereto.

Supplement No. 1 to said I. C. C. No. 150, filed December 30, 1918.

American Railway Express Company Local and Joint Tariff of First and Second-Class Express Rates No. 3, filed July 3, 1918; said I. C. C. No. 2 having been in force on February 9, 1919, as amended by supplement No. 2 thereto.

Supplement No. 2 to said I. C. C. No. 2, filed December 30, 1918.

57 Terminal and Switching Charges, F. G. Airy, Agent, I. C. C. No. A-2095, filed March 23, 1917; said I. C. C. No. A-2095 having been in force on February 9, 1919, as amended by Supplements Nos. 2, 3 and 4 thereto.

Supplement No. 2 to said I. C. C. No. A-2095, filed June 11, 1917.

Supplement No. 3 to said I. C. C. No. A-2095, filed July 18, 1917.

Supplement No. 4 to said I. C. C. No. A-2095, filed June 29, 1918.

Joint Directory of Express Stations, F. G. Airy, Agent, I. C. C. No. A-3, Title Page and Rules Section (First Revision) filed August 17, 1917; Louisiana Section (Third Revision) filed November 20, 1918; Texas Section (Second Revision) filed June 18, 1917; said sections having been in force on February 9, 1919, as amended by Supplements Nos. 69, 70 and 71 thereto.

Supplement No. 69 to said sections, filed November 20, 1918.

Supplement No. 70 to said sections, filed December 18, 1918.

Supplement No. 71 to said sections, filed January 22, 1919.

Joint Directory of Collection and Delivery Limits at Express Stations, F. G. Airy, Agent, I. C. C. No. A-4, Rules and Title Page Section (First Revision), filed September 4, 1915; said section having been in force on February 9, 1919, as amended by Supplements Nos. 1 and 2 thereto.

Supplement No. 1 to said section, filed October 23, 1917.

Supplement No. 2 to said section, filed June 29, 1918.

Louisiana Section of said I. C. C. No. A-4, filed December 31, 1913; said section having been in force on February 9, 1919, as amended by Supplements Nos. 9, 10 and 11 thereto.

58 Supplement No. 3 to said section, filed April 12, 1917.

Supplement No. 10 to said section, filed June 14, 1917.

Supplement No. 11 to said section, filed June 29, 1918.

Texas Section (First Revision) I. C. C. No. A-4, filed December 8, 1916; said section having been in force on February 9, 1919, as amended by Supplements Nos. 19 and 20 thereto.

Supplement No. 19 to said section, filed September 19, 1918.

Supplement No. 20 to said section, filed October 22, 1918.

American Railway Express Company Local and Joint Block Tariff, I. C. C. No. 947, filed December 30, 1918; said section having been in force on February 9, 1919, as amended by supplement No. 1 thereto.

Supplement No. 1 to said I. C. C. No. 947, filed December 30, 1918.

In Witness whereof I have hereunto set my hand and affixed the Seal of said Commission this 6th day of January, A. D. 1920.

[SEAL.] GEORGE B. McGINTY,
Secretary of the Interstate Commerce Commission.

Uniform Express Receipt.

The Company will not pay over $50, in case of loss, or 50 cents per pound, actual weight, for any shipment in excess of 100 pounds, unless a greater value is declared and charges for such greater value paid.

—— Express Company.

Non-negotiable Receipt.

—— —, 191-.

59 Received from —— ——, subject to the Classifications and Tariffs in effect on the date hereof —, value herein declared by shipper to be — dollars.
Consigned to —— ——, at ——. Charges, —.

Which the Company agrees to carry upon the terms and conditions printed on the back hereof, to which the shipper agrees, and as evidence thereof accepts and signs this receipt.

—— ——,
Shipper.
—— ——,
For the Company.

Freight Classification.

Rules.

1. Application of Rates and Charges:

(*a.*) First-class rates are applicable to all property received for transportation by the Companies parties to this Classification, unless otherwise hereinafter provided.

(*b.*) If a shipment is rated first class the charge shall be ascertained by reference to "Local and Joint Tariff of First and Second-class Express Rates" lawfully on file with the Interstate Commerce Commission, the Canadian Railway Commission and the Public Service Commissions and Railroad Commissions with which this Classification is filed.

60 (*c.*) ½ of 1. On shipments classified at one-half first class, the charge shall be one-half of the charge of the First-class rate, unless otherwise provided in individual items.

(*d.*) On a shipment classified at higher than first-class rate the charge at the First-class rate must be multiplied by the number indicating the higher classification. If classified at "1½ to 1", multiply the charge at First-class rate 1½; if classified at "2 to 1", multiply the charge at First class rate by 2, etc.

(*e.*) Second-class rates are applicable to commodities herein classified as second class and to all articles of Food and Drink except as hereinafter otherwise provided (See Rule 19.)

(*f.*) If a shipment is rated second class the charge shall be ascertained by reference to "Local and Joint Tariff of First and Second-class Express Rates" lawfully on file with the Interstate Commerce Commission, the Canadian Railway Commission and the Public

Service Commissions First and Second Districts, State of New York, and the Railroad Commissions with which this Classification is filed.

(*g.*) Shipments entitled to Second-class rates, when so packed as to conceal their nature, must be marked with their correct designations. If not so marked the shipment will be billed at First-class rates, subject to revision upon subsequent disclosure or proof of the actual contents.

(*h.*) Unless otherwise provided, charges on Second-class matter must be based upon the gross weight of the shipment at the
61 time it is received for transportation provided, however, that when it is necessary to use ice for preservation, and it is used for that purpose only, an allowance of 25 per cent. from the gross weight will be made from March to November, inclusive, and an allowance of 15 per cent, from gross weight will be made from December to February, inclusive, but the weight so ascertained must not be less than the gross weight of the shipment without the ice. (See also Rules 10 and 11 concerning weights).

(*i.*) Two or more packages of Second-class matter from the same shipper at the same time to the same consignee shall be aggregated and charged for upon the aggregated weight.

(*j.*) Third-class rates are applicable to commodities herein classified as third class and are 1 cent for each 2 ounces or fraction thereof, minimum charge 15 cents, but the charge at Third-class rates must not be more than the charge at First-class rates.

Each package should have the name of the article or articles contained therein written, stamped or printed thereon.

The true value, which must not exceed $10.00, or the notation "Value Not Exceeding $10.00" must be placed on the package by the shipper and entered on the receipt.

(*k.*) Pound rates. This term is used to indicate that the charge for a package of 100 pounds to be multiplied by the number of pounds in the shipment and the product so obtained divided by 100. The result will be the charge.

Example: charges on a shipment weighing 75 pounds between points taking Scale No. 2 (66 cents for 100 pounds) on
62 which Pound rates apply would be ascertained by multiplying 66 x 75 and dividing the product by 100—49.5 cents or 50 cents.

(*l.*) When the net weight is a necessary factor in computing the charge upon any commodity, shippers must mark the net weight upon the package; when not so marked by shipper, such packages must be charged for upon the gross weight at time of shipment.

(*m.*) Fractions. In computing charges, whenever fractions occur, either in the aggregate weight or charges, the next higher whole number must be used.

(*n.*) Any package containing articles of more than one class must be charged at the rate applicable to the highest classed article contained therein unless specially provided to the contrary.

2. Receiving Shipments:

(*a.*) The shipper must be requested to place his name and address on all packages of First-class matter, and in the event of his refusal to do so charges must be prepaid.

(*b.*) A receipt of the form prescribed herein must be given for all matter received. The value of the property must be declared by the shipper, and inserted in the receipt. The shipper's declaration of such value may be made by inserting "not exceeding $50.00," or "not exceeding 50 cents per pound, actual weight," as the case may be, in the blank space in that portion of the receipt reading "value herein declared by shipper to be $—."

(*c.*) Shipments destined to points in the United States and adjacent Foreign Countries must not be accepted when con-
63 signed "To order of", or "To Notify" a bank or any person.

(*d.*) Uniform express receipts are not negotiable and shipments must not be accepted, the delivery of which is conditioned upon surrender of the original receipt at time of delivery.

(*e.*) Shipments must be prepared or packed in a manner to insure safe transportation with ordinary care on the part of the express companies. Packages containing fragile articles, or articles consisting wholly or in part of glass, must be packed so as to insure safe transportation by express with ordinary care; if not so packed and plainly marked as to indicate the nature of the contents, the company shall not be liable for damages to such shipments except when proved to be negligent. The agent of the exrpess company must not knowingly accept shipments not conforming to these requirements.

(*f.*) When consigned to a place at which the express company has no office, shipments must be marked with the name of the express station at which the consignee will accept delivery.

(*g.*) Shipments of jewelry, diamonds, or other precious stones, money, bullion, bonds, coupons, watches or valuable papers will not be accepted for shipment in packages containing ordinary merchandise unless such articles are described in the uniform express receipt, as shipments of this character are transported by the express company only through a special department. In case of loss of any of the articles above mentioned when shipped with other merchandise the express company will not be liable except for its own negligence unless such articles are described in the uniform express receipt.

64 (*h.*) Shipments consigned to an individual or firm at one express office, and marked in care of an individual or firm at some other express office, must not be accepted.

(*i.*) Shipments bearing special instructions.—If shipments are accepted bearing special instructions of the shipper to the Express Company, affecting the handling or delivery of shipments, and calling for service not provided for elsewhere in the tariffs or Classifications of the Express Company, no responsibility for compliance with such instructions will be assumed, nor will claims be paid by the Express Company for failure to observe or comply with such special instructions.

STATE OF LOUISIANA:

20th Judicial District Court, Parish of Lafourche.

I, Phillip J. Aucoin, Clerk of Court, duly commissioned and sworn in and for the Parish of Lafourche, State of Louisiana, do hereby certify that the within and foregoing pages contain a true and correct transcript of the pleadings and judgments in the matter of Lucius P. Levee vs. American Railway Express Company, No. 4977 on the Docket of this Court.

In testimony whereof, witness my hand and the impress of my seal of office, at Thibodaux, La., April 7th, 1922.

(Signed) P. J. AUCOIN,
Clerk of Court of Appeal, First Circuit, State of Louisiana.

65 *Certificate of Clerk of Supreme Court of Louisiana.*

I, Paul E. Mortimer, Clerk of the Supreme Court, State of Louisiana, do hereby certify that the within and foregoing pages contain a true and correct transcript of the application of certiorari made to this Court in the matter of Lucius P. Levee versus the American Railway Express Company on file in the Supreme Court of the State of Louisiana, which writ was refused and which refusal made the judgment of the Court of Appeal, First Circuit, State of Louisiana, final.

[Seal of the Supreme Court of the State of Louisiana.]

PAUL E. MORTIMER,
Clerk of Supreme Court, State of Louisiana.

66 Court of Appeal, First Circuit, State of Louisiana.

No. —.

LUCIUS P. LEVEE

versus

AMERICAN RAILWAY EXPRESS COMPANY.

By direction of the Honorable the Judges of the Court of Appeal, First Circuit, State of Louisiana, I, P. J. Aucoin, as Clerk of said Court, in obedience to the attached writ of certiorari issued out of

the Honorable the Supreme Court of the United States, and addressed to the Honorable the Judges of the Court of Appeal, First Circuit, State of Louisiana, commanding them to send, without delay, to the said Supreme Court the record of proceedings in the above entitled cause do attach to the said writ and send to the said Supreme Court a certified copy of a stipulation of counsel, in which said stipulation it is provided that the transcript of the proceedings in this case on file in the proceedings entitled "American Railway Express Company, petitioner, vs. Lucius P. Levee, respondent," No. 424 of the docket of the Supreme Court of the United States for October term, 1922, shall be taken as the record for the purposes of the return by the Clerk of the Court of Appeal, First Circuit, State of Louisiana, in response to the writ of certiorari to him directed, the original of which stipulation was filed in my office on this 13th day of November, 1922.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Court of Appeal, First Circuit, State of Louisiana, at Thibodaux, in the State of Louisiana, this 21st day of November, A. D. 1922.

[Seal of the Clerk of the Parish of Lafourche, La.]

P. J. AUCOIN,
Clerk of the Court of Appeal,
First Circuit, State of Louisiana.

67 Court of Appeal, First Circuit, State of Louisiana.

No. —.

LUCIUS P. LEVEE

vs.

AMERICAN RAILWAY EXPRESS COMPANY.

It is stipulated by and between Charles T. Wortham, attorney for Lucius P. Levee, plaintiff and appellee herein, and Hunter C. Leake and Arthur A. Moreno, attorneys for American Railway Express Company, defendant and appellant herein, that the transcript of the proceedings in this case on file in the proceedings entitled American Railway Express Company, petitioner, versus Lucius P. Levee, respondent, No. 424 of the docket of the Supreme Court of the United States for October term 1922 shall be taken as the record for the purposes of the return by the Clerk of the Court of Appeal, First Circuit, State of Louisiana, in response to the writ of certiorari to him directed.

It is further stipulated that the record of this case on file in the Supreme Court of the United States shall to all intents and purposes be considered as the record of the proceedings in this case the same as if such record had been forwarded by the Clerk of the Court of Appeal, First Circuit, State of Louisiana, in return to the certiorari

directed to the said Court of Appeal, First Circuit, State of Louisiana.

In witness whereof we have hereunto set our hands and seals on this 6th day of November, 1922.

HUNTER C. LEAKE,
ARTHUR A. MORENO,
Attorneys for American Ry. Exp. Co.
CHAS. T. WORTHAM,
Attorney for Lucius P. Levee.

68 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Court of Appeal, First Circuit, State of Louisiana, Greeting:

Being informed that there is now pending before you a suit in which American Railway Express Company is appellant, and L. P. Levee is appellee, which suit was removed into the said Court of Appeal by virtue of an appeal from the 20th Judicial District Court, Parish of Lafourche, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Court of Appeal and removed into the
69 Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-sixth day of October, in the year of our Lord one thousand nine hundred and twenty-two.

WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

70 [Endorsed:] File No. 28,974. Supreme Court of the United States, October Term, 1922. No. 424. American Railway Express Company vs. Lucius P. Levee. Writ of certiorari.

71 & 72 [Endorsed:] File No. 28,974. Supreme Court U. S., October Term, 1922. Term No. 424. American Railway Express Co., Petitioner, vs. Lucius P. Levee. Writ of certiorari and return. Filed Nov. 27, 1922.

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Supreme Court of the United States.

OCTOBER TERM, 1923.

No. 54.

AMERICAN RAILWAY EXPRESS COMPANY,
Petitioner-in-Error,

vs.

LUCIUS P. LEVEE,
Respondent-in-Error.

CERTIORARI TO REVIEW A JUDGMENT OF THE CIRCUIT COURT OF APPEALS, FIRST CIRCUIT, STATE OF LOUISIANA.

BRIEF ON BEHALF OF AMERICAN RAILWAY EXPRESS COMPANY, PETITIONER IN ERROR.

Statement of the Case.

This case is before the court on a writ of certiorari directed to the Circuit Court of Appeal, First Circuit, State of Louisiana, to review a judg-

ment rendered in favor of Lucius P. Levee against the American Railway Express Company in the sum of $863.75 with interest and costs. The judgment was rendered in a suit growing out of a shipment in interstate commerce and the American Railway Express Company claims it has been denied a federal right because in the determination of the suit the Circuit Court of Appeal applied the State statute governing the liability of common carriers and refused to apply the Federal Law, Section 20 of the Act to Regulate Commerce, as amended, being the Carmack Amendment, 34 Stat. at Large 584, as amended by the Cummins Amendment, Act of March 4, 1915, C. 176, 38 Stat. 1196, as amended by the Act of August 9, 1916, C. 301, 39 Stat. 441; and the decisions of this Court interpreting and applying those statutes and their principles.

Lucius P. Levee filed suit against the American Railway Express Company in the Twentieth Judicial District Court, State of Louisiana, for $863.75 ($845.45 and the cost of replacing certain notes and stock certificates), the alleged value of a trunk and its contents shipped by him from Madisonville, Texas, to himself at Thibodeaux, Louisiana, on February 8, 1919. He was given an express receipt, and sued upon this contract evidenced by the express receipt which he attached to his petition. This form of receipt had been duly filed with and approved by the Interstate Commerce Commission (Transcript 32) and contained, among other provisions, the following:

> "In consideration of the rate charged for carrying said property, which is dependent upon the value thereof, and is based upon an agreed valuation of not exceeding Fifty Dollars for any shipment of one hundred pounds

or less, and not exceeding fifty cents per pound, actual weight, for any shipment in excess of one hundred pounds, unless a greater value is declared at the time of shipment, the shipper agrees that the Company shall not be liable in any event for more than Fifty Dollars for any shipment of one hundred pounds or less, or for more than fifty cents per pound, actual weight, for any shipment weighing more than one hundred pounds, unless a greater value is stated herein. *Unless a greater value is declared and stated herein the shipper agrees that the value of the shipment is as last above set out, and that the liability of the Company shall, in no event, exceed such value.*"

The receipt further showed the shipment to weigh one hundred pounds and *that there was no declaration of value by the shipper.* The shipper affirmed the validity of that contract by filing suit thereon and claiming rights thereunder. The American Railway Express Company answered by acknowledging the execution of the contract and the loss of the trunk, and affirmatively set up that the contract was the usual uniform express receipt and that the rate provided under that contract limited the liability of the carrier to Fifty Dollars.

The facts developed on the trial showed that there had been no declaration of value by the shipper, and that, as a consequence of a failure to declare the value, the trunk went forward on a rate of $2.83 and that if a declaration of a value of $845.45 had been made the rate would have been $3.72. The agent at the point of shipment did not know, in dollars and cents, the amount of the rate and the shipment was forwarded with charges "collect"—that is, to be paid at destination. Had the shipper paid, either at the point of origin or at the point of

destination, the rate collectible under the provisions of the receipt and of the Classification and tariffs of the Express Company then in effect and duly filed with the Interstate Commerce Commission, and duly published and posted as required by law, it would have been $2.83, which was the rate limiting the liability to Fifty Dollars, and not $3.72 which would have been the rate applicable if a value of $845.45 had been declared on the shipment by the shipper.

The American Railway Express Company set up that the contract was one in interstate commerce; that the governing tariffs and charges were subject to the regulation of the Interstate Commerce Commission; that it had approved the tariffs upon which the contract was based; and that there was, therefore, a right on defendant's part to limit its liability to Fifty Dollars. Certified copies of such tariffs were introduced in evidence at the trial. The American Railway Express Company further set up that the rights and liabilities of the parties to the contract were governed by the power of regulation and control of the United States over the field of interstate commerce, and that the limitation of liability had been upheld in numerous cases decided by this Court. It was further pressed upon the attention of the court that the interpretation and determination of contracts in interstate commerce and of the rights of the parties thereto were matters of federal cognizance, to be tested by the principles laid down by the federal courts. There was cited in support of this contention, Texas & Pacific Railway Co. *v.* Mugg, 202 U. S. 242; C. & A. R. Co. *v.* Kirby, 225 U. S. 155; Adams Express Co. *v.* Croninger, 226 U. S. 491; Kansas City Sou. R. Co. *v.* Carl, 227 U. S. 639; M. K. & T. R. Co. *v.* Harri-

man, 227 U. S. 657; Boston & Maine R. R. Co. *v.* Hooker, 233 U. S. 97.

The trial court refused to apply the principles of these cases but instead rendered judgment in favor of the plaintiff and against the defendant on the authority of Lehman, Stern Co. *v.* M. L. & T. R. R. & S. S. Co., 115 La. 1; Simms *v.* N. O. & N. E. R. Co., 122 La. 268; National Rice Milling Co. *v.* N. O. & N. E. R. Co., 132 La. 615.

An appeal was taken from this judgment to the Circuit Court of Appeal, First Circuit, which affirmed the judgment of the lower court on the authority of the cases cited by the court of first instance. The judgment of the Circuit Court of Appeal rested upon the contention that the carrier had not exempted itself from liability for the loss of the goods, and that, therefore, since it was liable the provision for a limitation of liability had no application. It destroyed the provision for a limitation of liability at the very moment it was called into being by the stipulation of the contract, and, therefore, wholly read out of the contract a stipulation for a limitation of liability which had been repeatedly upheld by this Court in spite of the fact that the decisions in which it had been upheld were called to the attention of the court.

The defendant applied to the Circuit Court of Appeal, First Circuit, for a rehearing and such rehearing was refused. Thereafter, and within the proper time, the defendant applied to the Supreme Court of Louisiana for a writ of certiorari, which application was denied. Thereupon this petitioner filed in this Court its petition for a writ of certiorari to the final judgment of the said Circuit Court of Appeal, First Circuit,

State of Louisiana, which was duly allowed on the 9th day of October, 1922.

A motion to dismiss has been filed on the grounds (*a*) that the writ was not applied for within three months after the entry of the judgment complained of; (*b*) that the writ of error herein issued is not directed to the highest court of the State in which a judgment could be had, and where, in this case, a decision actually was had; (*c*) that no federal question is raised by the judgment complained of. Consideration of that motion has been postponed by this Court until the hearing of the case on the merits.

Specification of Errors.

It is submitted that the Court of Appeal, First Circuit, State of Louisiana, erred in entering the final judgment in this case in the following particulars, to wit:

1. The Court erred in applying to a determination of the rights arising from a contract for the shipment of goods in interstate commerce rules applicable to shipments intrastate in Louisiana (Transcript pp. 25, 26).

2. The Court erred in failing to limit the liability of the carrier in case of the loss of the goods, which limitation of liability was based upon the benefits received by the shipper who was obligated to pay only the lower rate as a consideration for such limitation of liability.

3. The Court erred in failing to hold that the shipper knew that the charges upon the package

shipped were based upon the value of the shipment and that the carrier required that the value should be declared by the shipper and that if he did not disclose and declare a greater value than $50 when he delivered the shipment to it at Madisonville, Texas, for transportation to Thibodeaux, Louisiana, the rate charged would be based upon a valuation of $50.

4. The Court erred in holding that the shipper who sued for the loss of his goods upon a contract limiting the liability of the carrier could secure the amount which the obligation to pay a higher rate would have given him, by charging that the loss occurred through the negligence of the carrier. The recovery of any damages depends upon the breach of the contract, but the measure of damages depends upon the rate paid or to be paid by the shipper.

5. The Court erred in failing to apply the limitation of liability provided in the contract which was made a part of the petition and was the contract upon which suit was brought.

BRIEF OF THE ARGUMENT.

POINT I.

The application for the writ of certiorari was presented within the proper time; the writ of certiorari was directed to the proper court and the case raises a federal question.

(a) The Application for the Writ of Certiorari was presented within the Proper Time.

Addressing ourselves first to the motion of the respondent for a dismissal of the writ of certiorari:

The judgment of the Circuit Court of Appeal was rendered on February 6, 1922, and a rehearing refused February 11, 1922. Under Art. 101 of the Constitution of 1898 of the State of Louisiana, the party cast in a judgment of the Court of Appeal has thirty days in which to make application to the Supreme Court of Louisiana for a writ of certiorari. When application is made to the Supreme Court within thirty days the judgment of the Court of Appeal is suspended and does not become final until the application has been refused, or, if the Supreme Court has granted it, until the matter has been determined by the judgment of the Supreme Court. In the case of Salittes *v.* Southern Publishing Co., 140 La. 739, the Supreme Court of Louisiana said:

> "During the time a litigant had a right to apply for a writ of certiorari to the Supreme Court the judgment of the Court of Appeal was not effective and was suspended until the action of the court thereon."

It follows therefore that during the time there was pending before the Supreme Court of Louisiana the application of the American Railway Express Company for a writ of certiorari, that the judgment of the Court of Appeal was not final and continued to lack the elements of finality until the action of the Supreme Court of Louisiana in refusing the writ. The application in this case was made within three months from the time that the judgment of the Court of Appeal became final.

Your Honors have repeatedly held that an application will be entertained to review judgments only after they have become final. In the case of Coe *v.* Armour Fertilizer Co., 237 U. S. 416, a motion was made to dismiss on the ground that the Supreme Court of Florida had considered certain federal questions and remanded the case to the district court for trial, and that the application for writ of certiorari should have been made within three months from the determination of the federal question and not within three months from the second judgment of the Supreme Court finally determining the issues between the parties. This Court refused to dismiss the writ and said:

> "* * * But, as appears from what has been stated, the first decision did not conclude the litigation. It called for further proceedings in the Circuit Court, and not until the judgment rendered by that court on the going down of the mandate had been affirmed upon the second writ of error did there exist a final judgment in the court of last resort of that State such as might be brought under the review of this Court by virtue of Sec. 237 of the Judicial Code, act of March 3, 1911, Sec. 237, Ch. 231, 36 Stat. 1087, 1156" (p. 418).

The emphasis placed by this court was upon the finality of the judgment and this was again emphasized in Grays Harbor Co. *v.* Coats-Fordney Co., 243 U. S. 251, where the same conclusion was reached. The court in that case stated at pages 256, 257:

> "When the litigation in the state courts is brought to a conclusion, the case may be brought here upon the federal questions already raised as well as any that may be raised hereafter; for although the state courts, in the proceedings still to be taken, presumably will feel themselves bound by the decision heretofore made by the Supreme Court, 82 Washington, 503, as laying down the law of the case, this court will not be thus bound. United States *v.* Denver & Rio Grande R. R. Co., 191 U. S. 84, 93; Messenger *v.* Anderson, 225 U. S. 436, 444; Coe *v.* Armour Fertilizer Works, 237 U. S. 413, 418."

In Bruce *v.* Tobin, 245 U. S. 18, the court held that although the Supreme Court of South Dakota had determined definitely the rights of the litigants and had remanded the case to the lower court so that the plaintiff might be accorded such rights, that yet this judgment was not final in the sense of the act of Congress of September 6, 1916, Ch. 448, 39 Stat. 726. It held that this act contemplated finality in the sense that rights could be claimed and had under the judgment and that until the right of execution thereunder and the assertion of the power of the state by virtue of the judgment could be called into being, it lacked finality so as to be the basis for application for a writ of certiorari. The court said (p. 19):

> "It may be indeed said that although the case was remanded by the court below for a

new trial, the action of the court was in a sense final because it determined the ultimate right of the father to recover and the general principles by which that right was to be measured. But that contention is not open as it was settled under Sec. 709, Rev. Stats., Sec. 237, Judicial Code, that the finality contemplated was to be determined by the face of the record and the formal character of the judgment rendered,—a principle which excluded all conception of finality for the purpose of review in a judgment like that below rendered. Haseltine *v.* Bank, 183 U. S. 130; Schlosser *v.* Hemphill, 198 U. S. 173; Louisiana Navigation Co. *v.* Oyster Commission of Louisiana, 226 U. S. 99; Coe *v.* Armour Fertilizer Works, 237 U. S. 413, 418, 419. The re-enactment of the requirement of finality in the Act of 1916 was in the nature of things an adoption of the construction on the subject which had prevailed for so long a time.

"There being then no final judgment within the contemplation of the Act of 1916, the petition for a writ of certiorari is denied."

It follows from these decisions that since the litigation between the parties was not concluded by the rendition of the judgment of the Court of Appeal and its refusal of a rehearing, and that its finality depended upon the action of the Supreme Court, upon the application for a writ of certiorari, that the judgment here complained of did not become final under the contemplation of the act of 1916 until all the rights of the parties thereunder had been definitely determined. The petition for the writ was made within three months of the time the judgment became final.

If an application had been made to this court for a writ of certiorari before the Supreme Court of Louisiana had passed upon the application of the

American Railway Express Company for the writ of certiorari, such application to this court would have been premature, and if it had been granted it should have been dismissed, as was done in the case of Cheek *v.* Prudential Insurance Co., 252 U. S. 567.

(b) The writ of certiorari was properly directed to the Court of Appeal, First Circuit, State of Louisiana.

The second ground for the dismissal of the writ of certiorari is that the writ is not directed to the highest court of the State in which a decision could be had, and in which a decision was actually had, but is directed to an inferior court. Under Art. 101 of the constitution of the State of Louisiana of 1898 and 1913, the Supreme Court of Louisiana is given supervisory power over the Courts of Appeal, and in aid of such power may direct writs of certiorari to those courts ordering them to send up given cases. The writ issues not as of right but as a matter of discretion on the part of the Supreme Court. There was no judgment of the Supreme Court in this matter, but merely the action of the court in refusing to take jurisdiction of the cause. An examination of the transcript (pp. 1-7) shows that petitioner applied to the Supreme Court of Louisiana, *praying that it take jurisdiction of the case* and render a proper judgment therein. The petition for the writ of certiorari concludes as follows:

> "Wherefore, your petitioner prays that a writ of certiorari be granted it, directing and commanding the Court of Appeal for the First Circuit to send up to this honorable court the entire record in this case, in order that it may take cognizance thereof and render the proper decree herein."

The action of the Supreme Court of Louisiana was as follows:

> "Refused, for the reason that the judgment is correct."

It will thus be seen that there was *a prayer to that court that it take jurisdiction of the matter* and render a proper judgment therein, and that its action was a refusal to take jurisdiction of the cause. The mere fact that it gave its reason for refusing the jurisdiction did not make its action a judgment, but merely expressed an unwillingness to assume the jurisdiction which would have resulted in a judgment. Under the constitution of the State of Louisiana, Art. 101, it is provided that where the Supreme Court takes jurisdiction on a writ of certiorari it takes jurisdiction of the entire cause and must render such a judgment as it would have rendered if it had come up directly on appeal and not by way of certiorari. It is evident, that there was no joinder of issue in the Supreme Court of Louisiana and there was no judgment by it determining the rights of the parties. It merely refused to take jurisdiction of the cause and to render judgment.

The rules governing the granting or refusing of writs of certiorari in the State of Louisiana are the same as those applied by this court. In the syllabus in Murff *v.* State, 50 La. Ann. 998, it is said:

> "1. The power to review by writ of certiorari the decisions of the Court of Appeals was conferred on this court mainly to secure uniformity of jurisprudence, and to authorize such review when the question decided by the Court of Appeals was one of law and public importance. The provision in the Constitution of

1898, conferring on this court this power to issue writs of certiorari, is given in the terms of the acts of Congress of March 3, 1891, authorizing the Supreme Court of the United States to review by certiorari the decisions of the Circuit Courts of Appeals, and the jurisprudence of the Supreme Court of the United States, under the act of 1891, furnishes a guide for us in the exercise of this new jurisdiction. Constitution of 1898, Art. 101; Act of March 3, 1891; 26 Statutes, p. 828, Sec. 6; 141 U. S. p. 583; 144 U. S., p. 47; 162 U. S., p. 435; 165 U. S., p. 443.

"2. The writ will not issue to review decisions of mere questions of fact."

This court has said that hereafter it will not undertake to determine whether or not jurisdiction had been taken by a superior court of a cause and judgment rendered therein by the application of the rules of states practice, but that the question would be determined as to whether or not a judgment had been rendered by the form of the action of the state court. In the case of Western Union Telegraph Co. *v.* Crovo, 220 U. S. 364, a writ of error directed to the trial court was refused "by the Supreme Court of Appeals under local practice, because the court thought 'the judgment was plainly right' ". And this court said:

"The plaintiff in error has sued out two writs of error, one to the law and equity court of the city of Richmond, the trial court, and another to the Supreme Court of Appeals of Virginia. Inasmuch as the latter court denied a writ of error, the judgment of the law and equity court was the highest court of the State to which the case could be carried, and a writ will therefore lie to that court if a Federal question is properly saved" (p. 366).

The parallelism between the stated case and the case at bar is too clear for comment.

In Norfolk Turnpike Co. *v.* Virginia, 225 U. S. 264, this court said that thereafter it would not undertake to determine whether or not a superior court had taken jurisdiction of a cause because of the reasons assigned by it, but that it would look to the form of the judgment and not determine the question by facts beyond. The court said (p. 269):

> "While, therefore, in this case, for the reasons stated, we entertain jurisdiction and do not of our own motion dismiss the writ, for the purpose of avoiding the complexity and doubt which must continue to recur and for the guidance of suitors in the future we now state that, from and after the opening of the next term of this court, where a writ of error is prosecuted to an alleged judgment or a decree of a court of last resort of a State declining to allow a writ of error to or an appeal from a lower state court, unless it plainly appears, on the face of the record, by an affirmance in express terms of the judgment or decree sought to be reviewed, that the refusal of the court to allow an appeal or writ of error was the exercise by it of jurisdiction to review the case upon the merits we shall consider ourselves constrained to apply the rule announced in the Crovo Case, and shall therefore, by not departing from the face of the record, solve against jurisdiction the ambiguity created by the form in which the state court has expressed its action."

It follows therefore from the application of the principles of this case that the writ was directed to the proper court as the Court of Appeal for the First Circuit court was the highest court which had jurisdiction of the cause since the Supreme Court of the State of Louisiana might have taken juris-

diction but refused to do so because it deemed the action of the Court of Appeal to be correct upon the law and facts.

(c) **The case presents a Federal question.**

The third ground on which the respondent bases his motion to dismiss the writ of certiorari, granted by this Court herein, is that no Federal question is involved and that the decision of the State Court involves simply a matter of State practice.

The fallacy of this argument is apparent upon the mere statement of the issues involved. The record shows that the respondent here, the plaintiff in the State Court, brought suit to recover $863.75, the alleged value of a trunk and contents (and certain expenses incurred by him to replace notes and stock certificates) which were delivered by him to the Express Company at its office in Madisonville, Texas, consigned to himself at Thibodeaux, Louisiana: The action was brought in assumpsit, the plaintiff alleging that he had entered into a written contract of shipment attaching a copy of such contract and making it a part of his petition. The Express Company admitted its failure to deliver the shipment and its resulting liability to the payment of damages, but set up specifically the term of the contract which in case of liability and resulting obligation to pay damages limited the amount thereof to the sum of $50.00 because of the rate paid by the shipper.

Under the practice in Louisiana it is not necessary to plead principles of law, nor to do anything further than to meet the issue tendered, as the facts out of which the Federal right arose were patent on the face of the papers; the petition of the plain-

tiff and the contract of the shipment, showing that the matter was one involving the rights and liabilities of a shipper and carrier in interstate commerce. The contract on which the suit was based is, what is known as, the Uniform Express Receipt which had been filed with the Interstate Commerce Commission and approved by it (Transcript, p. 32). Because of the failure of the shipper to declare a greater value, the shipment took a rate of $2.83. Had he declared the value of the shipment to be $845.45, the rate would have been $2.83 plus a valuation charge of 90 cents, or a total rate of $3.72 (Transcript, p. 32).

As stated by Mr. Justice Lurton, in the opinion of this Court, in Adams Express Co. *v.* Croninger, 226 U. S., 491, 507, 508: "This constitutes a Federal question and gives this Court jurisdiction". Discussing the effect of the Carmack Amendment, Mr. Justice Lurton said at page 505:

> "That the legislation supersedes all the regulations and policies of a particular State upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue and limits his power to exempt himself by rule, regulation or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all State regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the State upon the subject of such contracts. But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the State ceased to exist. Northern Pacific Ry. *vs.* State of Washington, 222 U. S. 370; Southern Railway *vs.* Reid, 222 U. S. 424;

Mondou *vs.* Railroad, 223 U. S. 1; Michigan Central Railroad *vs.* Vreeland, just decided.

To hold that the liability therein declared may be increased or diminshed by local regulation or local views of public policy will either make the provision less than supreme or indicate that Congress has not shown a purpose to take possession of the subject. The first would be unthinkable and the latter would be to revert to the uncertainties and diversities of rulings which led to the amendment. The duty to issue a bill of lading and the liability thereby assumed are covered in full, and though there is no reference to the effect upon State regulation, it is evident that Congress intended to adopt a uniform rule and relieve such contracts from the diverse regulation to which they had been theretofore subject."

This ruling has been applied so frequently by this Court as to require no extended argument as to its application here. Mr. Justice Day speaking for this Court in Atchison, Topeka & Santa Fe Ry. Co. *vs.* Robinson, 233 U. S. 173, 180, stated:

"That the effect of the Carmack Amendment to the Hepburn Act (Section 20, Act of June 29, 1906, 34 Stat. 584) was to give to the Federal jurisdiction control over interstate commerce and to make supreme the Federal legislation regulating liability for property transported by common carriers in interstate commerce has been so recently and repeatedly decided in this court as to require now little more than a reference to some of the cases. Kansas City Southern Ry. Co. *v.* Carl, 227 U. S. 639; Missouri, Kansas & Texas Ry Co. *v.* Harriman, 227 U. S. 657; Chicago, Rock Island & Pacific Ry. Co. *v.* Cramer, 232 U. S. 490; Great Northern Ry. Co. *v.* O'Connor, 232 U. S. 508."

See also

C. & W. C. R. Co. *vs.* Varnville Furriture Co., 237 U. S. 597;

Southern Express Co. *vs.* Byers, 240 U. S. 612, and cases cited;

Ga., Fla. & Ala, R. Co. *vs.* Blish Milling Co., 241 U. S. 190;

C. N. O. & T. P. R. Co. *vs.* Rankin, 241 U. S. 327;

C. & N. W. R. Co. *vs.* Whitnack Co., 258 U. S. 369.

That the field of Federal regulation of interstate commerce is not to be invaded by local rules is clearly and specifically held by this Court in Ga., Fla. & Ala. R. Co. *vs.* Blish Milling Co., *supra.* In that case, suit was filed in the State Court of Georgia on a bill of lading covering a shipment in interstate commerce. The carrier set up the defense that there was a provision in the bill of lading requiring the filing of claims for loss or damage within a specified time and that because of the failure of the shipper to comply with such provision, his right of recovery had become barred. The Georgia Court refused to uphold the validity of the stipulation and the shipper sought to escape the terms of the bill of lading by claiming there was a difference between "a failure to make a delivery and where the goods were lost or damaged and that the failure to make delivery amounted to a conversion of the goods". *This court swept away so tenuous a distinction and held that the provision had application to a case where the shipper had been denied the possession of his goods irrespective of the cause from which it arose,* and held that the rights under the bill of lading were not to be determined by the form in which the action was brought,

but that the terms of such bill of lading were controlling and were not to be impinged upon, or destroyed, by the mere form of action. The Court said at page 197:

> "In this view, it necessarily follows that the effect of the stipulation could not be escaped by the mere form of the action. The action is in trover, but as the State Court said, 'if we look beyond its technical denomination, the scope and effect of the action is nothing more than that of an action for damages against the delivering carrier'. 15 Ga. App., p. 147. It is urged, however, that the carrier in making the misdelivery converted the flour and thus abandoned the contract. But the parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal Act; nor could the carrier by its conduct give the shipper the right to ignore the terms which were applicable to that conduct and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the Act and open the door to the very abuses at which the Act was aimed."

Further argument seems unnecessary to support the proposition that the case presents a Federal question, that the writ of certiorari was properly granted, and that the petition for dismissal thereof should be denied. However, further discussion of this question necessarily will follow since the determination of the case on the merits directly involves the question whether the decision of the State Court constituted a denial of a right set up and claimed by this petitioner under a statute of the United States, known as Section 20 of the Act to Regulate Commerce (the Carmack Amendment as amended by the Second Cummins Amendment).

POINT II.

The shipment being interstate, the meaning and effect of the express receipt and the rights of the parties thereunder must be interpreted and determined by the Federal law, rules and decisions, and not by the laws, rules or decisions of the State of Louisiana.

This petitioner seeks to challenge by this writ the final judgment of the Court of Appeal, First Circuit, State of Louisiana, and the reasons therefor given in the written opinion filed and entered by said court in support of said judgment, whereby the said court erred in applying to a determination of the rights of a shipper and carrier arising from a contract for the transportation of goods in interstate commerce, the law and rules applicable to shipments intrastate in Louisiana, and failed to limit the liability of the carrier for the loss of the goods to $50.00, the value agreed upon by the shipper, in consideration of the rate charged or to be charged upon the shipment.

The Specifications of Error numbered 1, 2, 3, 4 and 5, *supra,* challenge the final judgment given by the Court of Appeal, First Circuit, State of Louisiana, and the opinon of the Court supporting such judgment and call in question the correctness of the decision of said Court in failing to limit the liability of the carrier in respect to the shipment in question.

We earnestly submit that the judgment of the Court of Appeal, First Circuit, State of Louisiana, is erroneous and constitutes a denial of a right

set up and claimed by this petitioner under a statute of the United States, commonly known as Section 20 of the Act to Regulate Commerce (the Carmack Amendment as amended by the Second Cummins Amendment, Act of June 29, 1906, 34 Statute 584, Chapter 3591; Act of August 9, 1916, 39 Statute 441, Chapter 301). By said Act it is provided that any common carrier, railroad or transportation company, subject to the provisions thereof

> "shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered, or over whose line or lines such property may pass within the United States * * * and no contract, receipt, rule, regulation or other limitation of any character whatsoever shall exempt such common carrier * * * from the liability hereby imposed, and any such common carrier * * * so receiving property for transportation * * * shall be liable to the lawful holder of said receipt or bill of lading, or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the actual loss, damage or injury to such property, caused by it or by any such common carrier, railroad or transportation company, to which such property may be delivered * * * notwithstanding any limitation of liability or limitations of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation or in any tariff filed with the Interstate Commerce Commission: Provided, however, That the provisions hereof, respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or represen-

tation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary live stock, received for transportation, concerning which the carrier shall have been, or shall hereafter be, expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not as far as relates to values, be held to be a violation of Section ten of this Act to regulate commerce, as amended; and any tariff schedule which may be filed with the Commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared or agreed upon; and the Commission is hereby empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation."

There was tendered under the pleadings and evidence the rights of a shipper in a contract of interstate commerce and there was asserted by the defendant in the lower court the right to claim a limitation of liability in accordance with the provisions of the uniform express receipt issued for the shipment and of the classification and tariffs of the carrier American Railway Express Company which were on file with the Interstate Commerce Commission, had been approved by it and had been

duly published and posted as required by law. This Court has held repeatedly that the rights and duties of a carrier in interstate commerce are to be measured and tested by federal statutes and federal decisions, interpreting and applying these statutes, and principles of common law liability, as known and applied in the federal courts. Under these decisions, this court has held that where a contract has been entered into between a carrier and shipper that such a contract is impressed with certain fixed rights which are beyond the powers of the parties to change, and that mere error on the part of the shipper to pay or the carrier to exact the proper rate will not have the effect of relieving either or both from the terms of the contract.

By the terms of the contract between the parties hereto—and the plaintiff below adopted the contract and based his suit thereon—the shipper agreed to a valuation of $50.00 for his trunk and its contents, in consideration of the lower alternative rate afforded by the terms of the receipt and the filed tariffs. The contract between them was beyond the will of either to change. In the case of Texas & Pacific R. Co. *v.* Mugg, 202 U. S. 242, Mugg was quoted a rate by the agent of the defendant company at the time the shipment was made but before delivery a greater rate was exacted from him, which resulted in a loss, because of the sale of the coal at a price predicated upon the freight charges quoted. The court said at page 245:

> "* * * whatever may be the rate agreed upon, the carrier's lien on the goods is, by force of the act of Congress, for the amount fixed by the published schedules of rates and charges, and this lien can be discharged, and the consignee become entitled to the goods, only by the payment, or tender of payment of such amount."

To the same effect is Illinois Central R. Co. *v.* Henderson Elevator Co., 226 U. S. 441.

It follows therefore from a consideration of these decisions that there automatically attached to the contract certain legal effects binding upon the parties thereto. Because of the failure of the shipper to declare a value and thereby become liable for the payment of the higher rate the law imposed on him a limitation of recovery. Conversely, because the carrier could exact only the lower rate in case the shipment arrived safely, it was entitled to claim, as it did claim, a limitation of its liability when the shipment did not arrive safely.

This case is clearly within the principle of Adams Express Co. *v.* Croninger, 226 U. S. 491, and the numerous other cases following the rule there laid down. In the Croninger case this court dealt with provisions of a contract similar to the one under discussion. The contract in the Croninger case read as follows:

> "In consideration of the rate charged for carrying said property, which is regulated by the value thereof and is based upon a valuation of not exceeding fifty dollars unless a greater value is declared, the shipper agrees that the value of said property is not more than fifty dollars, unless a greater value is stated herein, and that the company shall not be liable in any event for more than the value so stated, nor for more than fifty dollars if no value is stated herein."

The question was as to the right of the Express Company to limit its liability to $50. In that case, as in this, no inquiry had been made as to the value of the shipment and none declared, but that this collateral fact could not destroy the force of con-

gressional action fixing the contracts of the carrier, was stated by the Supreme Court as follows:

> "That no inquiry was made as to the actual value is not vital to the fairness of the agreement in this case. The receipt which was accepted showed that the charge made was based upon a valuation of fifty dollars unless a greater value should be stated therein. The knowledge of the shipper that the rate was based upon the value is to be presumed from the terms of the bill of lading and of the published schedules filled with the Commission. That presumption is strengthened by the fact that across the top of this bill of lading there was this statement in bold type: 'This company's charge is based upon the value of the property, which must be declared by the shipper' " (pp. 508-509).

The Court then held that the contract between the carrier and the shipper was one regulated by the expressed power of the Federal Government, and that this limitation of liability was binding upon the shipper, and so upheld the defense of the carrier.

In the case of Kansas City Southern Railway Co. *v.* Carl, 227 U. S. 639, the Supreme Court held that where a shipper entered into a contract limiting the liability of the carrier, predicated on a lower rate, that he was held to this limitation of liability. The court said at page 652:

> "The valuation declared or agreed upon as evidenced by the contract of shipment upon which the published tariff rate is applied, must be conclusive in an action to recover for loss or damage a greater sum. In saying this we lay on one side, as not here involved, every question which might arise when it is shown that the carrier intentionally connived with the shipper to give him an illegal rate, thereby

causing a discrimination or preference forbidden by the positive terms of the act of Congress and made punishable as a crime. To permit such a declared valuation to be overthrown by evidence *aliunde* the contract, for the purpose of enabling the shipper to obtain a recovery in a suit for loss or damage in excess of the maximum valuation thus fixed, would both encourage and reward undervaluations and bring about preferences and discriminations forbidden by the law. Such a result would neither be just nor conducive to sound morals or wise policies. The valuation the shipper declares determines the legal rate where there are two rates based upon valuation. He must take notice of the rate applicable, and actual want of knowledge is no excuse. The rate, when made out and filed, is notice, and its effect is not lost although it is not actually posted in the station; Texas & Pacific Railway *v.* Mugg, 202 U. S. 242; Chicago & A. Railway *v.* Kirby, 225 U. S. 155.

"It would open a wide door to fraud and destroy the uniform operation of the published tariff rate sheets. When there are two published rates, based upon difference in value, the legal rate automatically attaches itself to the declared or agreed value. Neither the intentional nor accidental misstatement of the applicable published rate will bind the carrier or shipper. The lawful rate is that which the carrier must exact and that which the shipper must pay. The shipper's knowledge of the lawful rate is conclusively presumed, and the carrier may not be required to surrender the goods carried upon the payment of the rate paid, if that was less than the lawful rate, until the full legal rate has been paid. Texas & Pacific Railway *v.* Mugg, *supra*. Nor is the carrier liable for damages resulting from a mistake in quoting a rate less than the full published rate. Illinois Central R. R. *v.* Henderson Elevator Co., 226 U. S. 441. Nor can

a carrier legally contract with a particular shipper for an unusual service unless he make and publish a rate for such service equally open to all. Chicago & Alton Railway *v.* Kirby, *supra.*"

See also

M. K. & T. R. Co. *v.* Harriman, 227 U. S. 657;

Boston & Maine R. Co. *v.* Hooker, 233 U. S. 97;

Pierce *v.* Wells Fargo & Co., 236 U. S. 278;

Western Union Telegraph Company *v.* Esteve Brothers & Company, 256 U. S. 566.

In the case of C. N. O. & T. P. R. Co. *v.* Rankin, 241 U. S. 319, this court upheld a stipulation limiting the liability of a carrier for the carriage of cattle where there were alternate rates. In that case this court said at pages 326-328:

"The shipment being interstate, rights and liabilities of the parties depend upon the acts of Congress, the bill of lading, and common law rules as accepted and applied in federal tribunals. Cleveland, etc. R. Co. *v.* Dettlebach, 239 U. S. 588; Southern Express Co. *v.* Beyers, 240 U. S. 612, and cases cited; Southern R. Co. *v.* Prescott, 240 U. S. 632.

* * * * *

"Under our former opinions the settled doctrine is that where alternate rates fairly based upon valuation are offered a railroad may limit its liability by special contract. Pierce Co. *v.* Wells Fargo & Co., 236 U. S. 278, 283.

"The essential choice of rates must be made to appear before a carrier can successfully claim the benefit of such a limitation and relief from full liability. And as no interstate rates

are lawful unless duly filed with the Commission, it may become necessary for the carrier to prove its schedules in order to make out the requisite choice. But where a bill of lading, signed by both parties, recites that lawful alternate rates based on specified values were offered, such recitals constitute admissions by the shipper and sufficient *prima facie* evidence of choice. If in such a case the shipper wishes to contradict his own admissions, the burden of proof is upon him. York Co. *v.* Central R. R., 3 Wall. 107, 113; The Delaware, 14 Wall. 579, 601; Hart *v.* Pennsylvania Railroad, 112 U. S. 331, 337; Cau *v.* Texas & Pacific Ry. Co., 194 U. S. 427, 431; Squire *v.* New York Central R. Co. 98 Massachusetts, 239, 248; Wabash R. R. *v.* Curtis, 134 Ill. App. 409, 412; Hutchinson on Carriers, 3d ed. Sec. 475.

"The bill of lading in question is plainly entitled 'Contract for Limited Liability in the Transportation of Live Stock at Reduced Rates' and contains the conspicuous provisions concerning published rates, tariff regulations, choice offered the shipper and limit upon the carrier's liability, etc., above set out. In view of these recitals and admissions, the limitation of liability must be treated as *prima facie* valid, and, consequently, the trial court erred in holding it void as a matter of law and permitting a recovery for full value of the animals.

That a federal question is presented whenever the rights under a bill of lading covering an interstate shipment are asserted is clearly illustrated by the case of A. T. & S. F. R. Co. *v.* Harold, 241 U. S. 371. In that case the courts of Kansas in determining responsibility of a carrier under a bill of lading of an interstate shipment applied a local rule investing an innocent holder of a bill of lading with rights not available to the shipper. This court, in holding that in the interpretation of rights under

bills of lading local rules were not applicable, because the application had been excluded by congressional action, said at page 378:

> "* * * it is not disputable that what is known as the Carmack Amendment to the Act to Regulate Commerce (act of June 29, 1906, c. 3591, Sec. 7, 34 Stat. 593) was an assertion of the power of Congress over the subject of interstate shipments, the duty to issue bills of lading and the responsibilities thereunder, which in the nature of things excluded state action. Adams Express Co. *v.* Croninger, 226 U. S. 491, 505-506; Mo., Kan. & Tex. Ry. *v.* Harriman Bros., 227 U. S. 657, 671-672; Boston & Maine R. R. *v.* Hooker, 233 U. S. 97, 110; Atchison, Topeka & Santa Fe Ry. *v.* Robinson, 233 U. S. 173, 180; Cleveland & St. Louis Ry. *v.* Dettlebach, 239 U. S. 588; Georgia, Florida & Alabama Ry. *v.* Blish Milling Co., *ante,* p. 190.
>
> "Indeed in the argument it is frankly conceded that as the subject of a carrier's liability for loss or damage to goods moving in interstate commerce under a bill of lading is embraced by the Carmack Amendment, state legislation on that subject has been excluded. It is insisted, however, that this does not exclude liability for error in the bill of lading purporting to cover an interstate shipment because 'Congress has legislated relative to the one, but not relative to the other.' But this ignores the view expressly pointed out in the previous decisions dealing with the Carmack Amendment that its prime object was to bring about a uniform rule of responsibility as to interstate commerce and interstate commerce bills of lading,—a purpose which would be wholly frustrated if the proposition relied upon were upheld. The principal subject of responsibility embraced by the act of Congress carried with it necessarily the incidents thereto. See the subject aptly and clearly illustrated by St. Louis & San Francisco R. R.

v. Woodruff Mills, 105 Mississippi, 214, where a statute of the State of Mississippi accomplishing the very result applied by the court below was decided to be no longer applicable to interstate commerce because of the taking possession by Congress of the field by virtue of the amendment referred to.

"As it follows from what we have said that the court below erred in applying the local law to the interstate commerce shipment under consideration, its judgment must be reversed and the case remanded for further proceedings not inconsistent with this opinion."

The same rule was applied in Southern Express Co. *v.* Byers, 240 U. S. 612. In that case the trial court had refused to permit proof of the schedules under which the limitation of liability arose, and this court held it to be plain error to exclude the rate schedules stating at page 614:

"Manifestly the shipment was interstate commerce; and, under the settled doctrine established by our former opinions, rights and liabilities in connection therewith depend upon acts of Congress, the bill of lading and common law principles accepted and enforced by the Federal courts. In order to determine the validity and effect of restrictions upon liability contained in such bills, it is important, if not indeed essential, to consider the applicable schedules on file with the Commission. Adams Express Co. *v.* Croninger, 226 U. S. 491; C. B. & Q. Ry. *v.* Miller, 226 U. S. 513; C. St. P. M. & O. Ry. *v.* Latta, 226 U. S. 519; Wells Fargo & Co. *v.* Neiman-Marcus Co., 227 U. S. 469; Kansas Southern Ry. *v.* Carl, 227 U. S. 639; Mo., Kans. & Tex. Ry. *v.* Harriman, 227 U. S. 657; Chicago, R. I. & Pac. R. *v.* Cramer, 232 U. S. 490; Boston & Maine RR. *v.* Hooker, 233 U. S. 97; Pierce Co. *v.* Wells Fargo & Co., 236 U. S. 278; N. Y. & Norfolk RR. *v.* Peninsula Exchange, 240 U. S. 34."

A case that is exactly parallel to ours was that of Galveston, etc., Ry. *v.* Woodbury, 254 U. S. 357. Mrs. Woodbury purchased a ticket in Canada for a trip through the State of Texas, which included the right to check her trunk. There was a limitation under the rate paid to $100 in case the carrier should become responsible for the loss of the trunk. She was not told when she purchased her ticket or when she checked her trunk that there was any limitation upon the amount of the carrier's liability. It did not appear whether the ticket purchased contained notice of any such limitation, nor did it appear what was the law of Canada in this respect. The company insisted that Mrs. Woodbury was on an interstate journey; and that under the Act to Regulate Commerce, February 4, 1887, c. 104, 24 Stat. 379, as amended, it was not liable for more than $100; since it had duly filed with the Interstate Commerce Commission and published a tariff limiting liability to that amount unless the passenger declared a higher value and paid excess charges, which Mrs. Woodbury had not done.

The court held that the rights under the contract for transportation were beyond the will of the parties and were the subject of regulation by the general government in the interest of public policy and concluded its opinion by saying at page 360:

> "Since the transportation here in question was subject to the Act to Regulate Commerce, both carrier and passenger were bound by the provisions of the published tariffs. As these limited the recovery for baggage carried to $100, in the absence of a declaration of higher value and the payment of an excess charge, and as no such declaration was made and excess charge paid, that sum only was recoverable."

It would seem to follow with almost mathematical precision that, since the respondent had not declared a value and had accepted a contract covering an interstate shipment which required him to pay a lower rate, that the Louisiana court should have recognized the paramount authority of the federal government and applied to the determination of the rights of the parties the provisions of Section 20 of the Act to Regulate Commerce and the decisions of this court upholding and making effective such provisions. However, it refused the application of these principles, and decided the case purely on a matter of state law. The Court of Appeal of the State of Louisiana confused the question of liability with that of the right of the parties to agree upon a measure of damages in consideration of a lower rate in accordance with the provisions of Section 20 of the Act to Regulate Commerce. The Court of Appeal did not discuss the question of *limitation of liability,* but considered merely the question of *liability,* which was not in issue since the carrier admitted loss of the shipment; and the only point to be determined was the amount of damages it should pay.

The cases cited by the court were all cases where the carrier had sought to relieve itself of liability for loss or damage to goods, but had failed to sustain the burden of proof put upon it, and consequently liability followed. In those cases, however, there was no question of *limitation of liability—i. e., the measure of the recovery*—but only the question whether or not the carriers had brought themselves within the exemption of the statute relieving them of *any liability.*

Concluding that the carrier in this case had failed to show that it was not relieved for the loss

or damage to the shipment, the Court of Appeal then proceeded to read out of the contract the limitation of liability. *The Court of Appeal considered the question of liability for the loss of the trunk when that was really not in issue in the case, because the carrier had at the beginning admitted its liability for the loss.* The effect of this decision was to deny application of the rule of limited liability recognized by this court, and to say that if the carrier were liable at all it could not benefit by an agreement with the shipper fixing the measure of damages for breach of the contract in consideration of the tariff rate charged.

In the brief of the respondent it is contended that the court properly applied a local rule of pleading and that no federal question was involved. It is sufficient answer to this contention to say that under the provisions of the Federal Law and the decisions of this court there could be no such rule, and that the state statute and the cases cited are directly in conflict with the provisions of the Federal statutes and the decisions of this court.

The Court of Appeal by an inversion of reasoning has said:

> "The defendant having admitted the receipt of plaintiff's trunk, and failure to deliver it, and having failed to allege and prove that same was lost accidentally or by some uncontrollable event is equivalent to an admission of converting it to its own use."

No Louisiana cases are cited in support of such a doctrine. The trial court in its opinion negatived any idea that there was any conversion by the carrier and said (Transcript, p. 20):

> "The defendant having failed to show the facts connected with its failure to deliver the

> trunk, as it was bound to do, by pleading and proof, the court will assume that the trunk was 'lost', as this seems to be the theory of its learned counsel and is more in keeping with the probabilites of the case, and it will not impute to the defendant's agents the commission of a crime, and that it was so lost by the negligence of defendant."

The trial court, however, fell into the error of holding that because the defendant had not absolved itself from responsibility for the loss of the trunk that therefore it could not avail itself of the provisions of the bill of lading measuring the rights of the parties in case of the liability of the carrier.

That the Court of Appeal not only failed to apply the Federal rule, but also completely departed from the jurisprudence of the State of Louisiana as expressed by the Supreme Court of Louisiana is fully illustrated by the cases of Tardos *v.* St. L. & N. O. R. Co., 35 La. Ann. 15; and Bornemann *v.* N. O. & M. C. R. Co., 145 La. 150. In those cases it was held that it was lawful under the Louisiana law for a carrier to limit its liability in case of loss resulting from its negligence, and in the Bornemann case it was further held that where a shipper in consideration of a lower rate had relieved the carrier from liability in case of loss, except in given conditions, that it was obligatory on the shipper to allege and prove the facts relieving him from the terms of the contract. Under the Louisiana cases Mr. Levee might have relieved himself from the terms of the contract by alleging and proving conversion. However, he did not do so, but tendered the issue arising under a violation of the terms of the contract, and on the trial testified that the trunk had been lost and that he had traced it unsuccessfully.

That the Court of Appeal has deliberately evaded consideration of the federal question is clearly shown by the fact that it has not even attempted to review and differentiate the cases cited in support of the federal right asserted. That the assertion of a federal right was timely and was urged persistently upon the courts throughout the trial is shown by the opinion of the trial court as follows (Transcript, p. 17):

> "Does this receipt, under the facts and circumstances of this case, limit defendant's liability to plaintiff for its failure to deliver said trunk to the sum of $50?
>
> Defendant's learned counsel contend it does, and in support of their contention they cite a number of decisions of the Supreme Court of the United States which they claim is decisive of the question, and the only authority by which the issue herein can be determined. No reason is assigned for the latter contention, and I know of no reason why this case can not be decided according to the laws of this State. * * *"

The same authorities which were urged upon that court were urged upon the Court of Appeal.

It is clear, therefore, that the interpretation of this contract had to be either by the laws of Louisiana or of the United States and that the Circuit Court of Appeal refused to apply the federal laws. In the case of C. & W. C. R. Co. *v.* Varnville Furniture Co., 237 U. S. 597, this court laid down in unmistakable terms the rule that the power of the federal government over contracts in interstate commerce was not only paramount but exlusive. In that case a statute of South Carolina said to be in aid of Federal regulation of interstate commerce was held to be invalid, since the passage

of the Carmack Amendment to the Act to Regulate Commerce. The court in that case said at page 603:

> "* * * As was said in Missouri, Kans. & Tex. Ry. Co. *v.* Harris, 234 U. S. 412, 420, the result of many recent cases, there cited, beginning with Adams Express Co. *v.* Croninger, 226 U. S. 491, and coming down through Boston & Maine R. R. *v.* Hooker, 233 U. S. 97, is that 'the special regulations and policies of particular States upon the subject of the carrier's liability for loss or damage to interstate shipments and the contracts of carriers with respect thereto, have been superseded.'"

In the case of C. & N. W. R. Co. *v.* Whitnack Co., 258 U. S. 369, it was said:

> "It is established doctrine that the rights and liabilities in respect of damage to goods moving in interstate commerce under through bills of lading depend upon acts of Congress, agreements between the parties, and common law principles accepted and enforced in the federal courts. New York Central & Hudson River R. R. *v.* Beaham, 242 U. S. 148, 151" (p. 371).

The Louisiana rule, therefore, being in conflict with the decisions of this court and federal enactments must give way and where a State court fails to discard State principles in favor of federal principles then there is a denial of federal right.

The cases cited in the brief of respondent as authority for the principle that where the decision may be sustained upon either a federal or non-federal ground, that no federal question is involved if the non-federal ground is broad enough to support the judgment or decree, are of unquestioned validity so far as they go. An examination of all the cases, however, shows that in those cases there was

a State ground to support the judgment. In this case, however, there could not be the application of a local rule destructive of the federal principles. The ground of decision is too narrow to have permitted its occupation by conflicting state and federal principles. The only issue before the court was the interpretation of the rights under a contract covering a shipment in interstate commerce, and, where the principles interpretative of that contract conflict, it is clear that the paramount authority of the federal government, as expressed in the Act to Regular Commerce and the decisions thereunder, must prevail over local rules. This rule is not to be departed from because, if permitted, the uniformity of rights secured by the Act to Regulate Commerce would be wholly destroyed.

That the field of federal regulation of interstate commerce is not to be invaded by local rules has been established by this court in the case of Georgia, etc., R. Co. *v.* Blish Milling Co., 241 U. S. 190, *supra,* in which this Court held that the rights under the bill of lading were not to be determined by the form in which the action was brought, since its terms were controlling, and that their control was not to be impinged upon, or destroyed, by forms of practice. This court said (p. 197):

> "In this view, it necessarily follows that the effect of the stipulation could not be escaped by the mere form of the action. The action is in trover, but as the state court said, 'if we look beyond its technical denomination, the scope and effect of the action is nothing more than that of an action for damages against the delivering carrier.' 15 Ga. App., p. 147. It is urged, however, that the carrier in making the misdelivery converted the flour and thus abandoned the contract. But the parties could not waive the terms of the contract under which the shipment was made pursuant to the Fed-

> eral Act; nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the Act and open the door to the very abuses at which the Act was aimed." * * *

This case did not involve a limitation of liability, but related to the validity of the notice of a claim provision of the bill of lading, but the Circuit Court of Appeals for the Sixth Circuit has had the precise question submitted to it, and held in Moore *v.* Duncan, 237 Fed. 780, that where a carrier published two rates for the transportation of tin, the lesser one being based upon a released valuation, and a shipper knowing of the two rates paid the lesser and accepted a bill of lading declaring that the amount of loss or damage for which the carrier was liable should be ascertained on the basis of the released valuation, whether or not the loss occurred from negligence, could recover only for the released valuation, although the loss resulted from the theft of the shipment by some of the employes of the carrier who were acting in their own interest, and against that of the carrier and shipper.

Mr. Justice Knappen, speaking for the Court in that case, states at page 784:

> "Concededly, it would not be violative of public policy to contract for limited liability in case of theft by a stranger. We can see no valid ground for holding such contract invalid in case of theft by an employe for his own sole purposes and against the interests and without the connivance of the carrier. Theft of goods in transportation, and in the possession of the

carrier for such purpose, is a theft from the carrier itself. Theft, under the circumstances stated, whether by a stranger or by an employe of the carrier, involves no misfeasance or lack of faithfulness on the part of the carrier. Such negligence of the carrier as may be involved in making theft possible is manifestly covered by the stipulation.

"None of the decisions of the Supreme Court of the United States before cited, relating to limitation of liability for loss, involved cases of theft; but neither those nor any other decisions of that Court, so far as we have found, in our opinion favor the doctrine asserted by plaintiff in error. On the contrary, we think the general propositions announced therein opposed to that doctrine. For example, in Kansas City So. Ry. Co. *v.* Carl, *supra,* 227 U. S., at page 651, 33 Sup. Ct., at page 394, 57 L. Ed. 683, the broad and unqualified statement is made that:

> 'When a shipper delivers a package for shipment and declares a value either upon request or voluntarily, and the carrier makes a rate accordingly, the shipper is estopped upon plain principles of justice from recovering, in case of loss or damage, any greater amount.'

"We think the reasoning of the case of Georgia, etc., Ry. Co. *v.* Blish Milling Co., 241 U. S. 190, 36 Sup. Ct. 541, 60 L. Ed. 948, although not involving limitation of liability, is impliedly opposed to the proposition of constructive conversion here asserted and holds that the effect of the stipulation of the bill of lading is not dependent on the form of action chosen in suing for the loss.

"We think the contract in question which limited liability to the released valuation is just and reasonable; that it violates no rule of public policy and is valid and enforceable."

To the same effect is D'Utassey *v.* Barrett, 219 N. Y. 420, 114 N. E. 786.

It is clear from this excerpt that the form of either practice or pleading is not determinative of the rights of the parties, but that these rights have been fixed by congressional action so that when the contract is entered into its effects are fixed by law and placed beyond the will of the parties.

This brings us to a consideration of the arguments in the brief of the respondent. It is contended that because the carrier admitted the loss of the trunk of the respondent that it thereby confessed to a conversion of the property. There was no suggestion of a conversion at any time in the pleadings, and under familiar principles of the common law it is clear that the carrier can not be charged with a conversion unless such conversion had been specifically alleged and proved. The conversion by the carrier of the trunk would have been an affirmative fact which should have been alleged at least so as to put the carrier on notice.

It is also sought in the brief to make it appear that the agent of the carrier was asked to insert a value in the shipment. The transcript does not bear out this contention, because nowhere does it appear that the plaintiff in the case ever offered to declare the value. It seems a sufficient answer, however, to say that under the rules of the cited cases the shipper was charged with a knowledge of the rates and practices approved by the Interstate Commerce Commission under which the carrier was operating, and that he could not transfer the duty of declaring a value to the agent of the carrier, so as to create in himself greater rights than accorded to other shippers. It also seems clear that the rights of a shipper can not be changed by the accident of haste

such as alleged in this case. If the respondent was in a hurry to catch a train, his hurry certainly could not have the effect of destroying congressional action and the settled public policy of the United States with regard to shippers. So that it follows that if it became necessary for him to stay over to effect a contract which he intended, it was obligatory upon him to do so. To permit such an ingenious argument to destroy settled principles of law would be to open the door to fraud and to make the rights of shippers depend not upon a fixed rule but upon accidental circumstances attendant upon the execution of the contract. The fact, however, that the contract was accepted by respondent without demur is conclusive of his agreement to be bound by its terms, and such agreement is not to be lightly cast aside upon the bare contention that he was in a hurry. The respondent having based his suit on said contract of carriage as measuring the rights and liabilities of the parties, relative to such shipment, must be bound by all of its terms and conditions.

It is suggested by counsel for respondent that possibly all the schedules were filed in the lower court but were not included in the transcript. As a matter of fact all the schedules were filed in the lower court, but by agreement between counsel, which has evidently escaped the attention of counsel for respondent, it was agreed that there should not be incorporated in the transcript on appeal all the tariffs of the American Railway Express Company, because such a transcript would have been merely burdensome to the court and without effect upon the case. However, by referring to the transcript (p. 32, testimony of John McCullom) it will be seen that he testified from these schedules

that there was a lower rate in force of $2.83 and a higher rate of $3.72. It will also be seen that the express receipt in evidence was filed with and approved by the Interstate Commerce Commission (Transcript, p. 52) and that on pages 53 and 54 of the transcript there is a reference to the tariffs under which the charges were made. We sincerely believe that the suggestion of counsel is made in good faith because of our knowledge of his high character and because of the fact that he has overlooked the agreement not to incorporate a lot of useless schedules so as to burden the record of the case.

However, the matter can be of no importance at this time, as the court below has treated the schedules as filed.

In the case of C. N. O. & T. RR. Co. *v.* Rankin, 241 U. S. 319, 327, 328, your Honors said:

> "* * * And as no interstate rates are lawful unless duly filed with the Commission, it may become necessary for the carrier to prove its schedules in order to make out the requisite choice. But where a bill of lading, signed by both parties, recites that lawful alternate rates based on specified values were offered, such recitals constitute admissions by the shipper and sufficient *prima facie* evidence of choice. If in such a case the shipper wishes to contradict his own admissions, the burden of proof is upon him."

As the contract in this case recites that alternate rates were offered the shipper, and as he sued under that contract and has not proved that no choice of rates was not offered, it follows that even if the schedules had not been offered, that under the principle of the Rankin case, there would be a presumption that the carrier had fully performed

its duty. There is an admission in the contract itself that the shipper had been offered a choice of rates, and so again under the doctrine of the Rankin case, the contention of respondent is completely dissolved from view. See also American Railway Express Company *v.* Lindenburg, 257 U. S. 627. Even if the tariffs had not been introduced in evidence, judicial notice would be taken thereof. U. S. *v.* W. F. & Co., 271 Fed. 180.

As illustrative of the fact that the laws of Louisiana regarding carriers are no different than those of other States and the principles recognized and applied by this court, we call your honors attention to the case of Bornemann & Co. *v.* N. O. M. & C. R. Co., 145 La. 150, wherein the plaintiff sought to escape the limitation of liability entered into in consideration of a lower rate. In that case the shipper contended there was no choice of rates offered him, but the Supreme Court of Louisiana disposed of that contention by holding, as this court did in the Rankin case, that the contract spoke for itself, and in the absence of grounds of relief from its terms they would be applied to the determination of the rights of the parties. The court in denying the contention of the plaintiff said:

> "Parties as a rule should be held to the terms of the contract they have accepted. Therefore, we think the most sensible view to take of a situation like the one presented here is that adopted by the Supreme Court of the United States in Cau *v.* T. & P. Ry. Co., 194 U. S. 431, 24 Sup. Ct. 664; 48 L. Ed. 1057, where the court said:
>
> > 'The consideration expressed in the bill of lading was sufficient to support its stipulations. This effect is not averted by showing that the defendant had only one rate. It

was the rate also of all other roads, and presumably it was adopted and offered to shippers in view of the limitation of the common-law liability of the roads.'"

This was expressive of the fact that it is the law of Louisiana that parties to a contract of shipment are bound by its terms. The court in that case differentiated its principle from that of Lehman, Stern & Co. *v.* M. L. & T. RR. & SS. Co., 115 La, 2, and National Rice Milling Co. *v.* N. O. & N. E. RR., 132 La. 615. Had the Court of Appeal applied the law of Louisiana correctly it would have noted the distinction between a case placing liability upon a carrier for the destruction or loss of goods, and one upholding a limited liability in case of an obligation to pay. The decision in the Bornemann case is principally important because emphasizing the fact of an intended departure from federal principles by the Court of Appeal, and if the Louisiana principle had been correctly applied and the decision in the Bornemann case given weight, there would have been a judgment for the petitioner.

That a state court can not ignore a federal question when properly presented and decide a case on some selected ground of state rule is well stated by the court in St. L. I. M. & S. R. Co. *v.* McWhirter, 229 U. S. 265. In that case the petitioner was sued for the death of McWhirter, killed while engaged in interstate commerce. The defendant in the lower court set up the statutes of Congress controlling the relationship of the parties, and on a motion to dismiss in this court it was contended that the State court had found a principle of common law liability sufficiently broad to support its judgment. The court in refusing the motion to

dismiss held there was a federal question involved, and said at page 274:

> "* * * As we have seen, the pleadings in express terms exclusively base the right to relief upon the statutes of the United States and no non-federal ground was either presented below or passed upon. It is true that although the case was exclusively rested upon federal statutes, as it comes here from a state court our power to review is controlled by Revised Statutes, Sec. 709, and we may therefore not consider merely incidental questions not federal in character, that is, which do not in their essence involve the existence of the right in plaintiff to recover under the federal statute to which his recourse by the pleadings was exclusively confined, or the converse, that is to say, the right of the defendant to be shielded from responsibility under that statute because when properly applied no liability on his part from the statute would result. Seaboard Air Line Ry. *v.* Duvall, 225 U. S. 447; St. Louis, I. M. & S. R. Co. *v.* Taylor, 210 U. S. 281. And of course, as the cause of action alleged was exclusively placed on the Federal statute and the defense therefore alone involved, determining whether there was liability undr the statute, the mere statement of the case involved the Federal right and necessarily required, from a general point of view, its determination. Swafford *v.* Templeton, 185 U. S. 487."

The court further held that to permit the bare suggestion that the state court had decided a question Federal in its essence on grounds of State polity would be to deny a federal right at the instance of any State court.

In Toledo, etc., R. Co. *v.* Slavin, 236 U. S. 454, the court held that the arbitrary selection of a non-Federal ground as a basis of decision by a State court could not destroy a federal right, and

that the question of federal right was to be determined by the issue presented and not by the selection of grounds of decision. In the case at bar the pleadings presented on their face a Federal question, which could be determined only upon a Federal ground, and the selection of any other ground was arbitrary and unwarranted. See also C. B. & Q. R. Co. *v.* Illinois, 200 U. S. 561; and A. C. L. R. Co. *v.* Glenn, 239 U. S. 388.

We respectfully say, in conclusion, therefore, that since this is a suit on a contract voluntarily entered into between the parties herein, and that since the contract was approved by the Interstate Commerce Commission and the rates charged for the transportation were lawful rates, that in the absence of fraud or mistake respondent is not relieved from the terms of the contract; that under well recognized federal principles the terms of the contract became fixed by its mere execution, and having been made can not be waived or changed by either party, either directly or indirectly, and that since the stipulation for a limited liability is valid and has repeatedly been upheld, it could not be destroyed by any local rule of practice.

We further contend that if the State of Louisiana could apply a rule of practice to the determination of a contract in interstate commerce that the power of Congress over the field of interstate commerce would not be absolute but that it would be invaded to the extent that States could pass laws of practice destructive of principles of policy of the federal government.

We further respectfully say that the opinion of the Court of Appeal is patently a denial of a federal right, because it refuses to give effect to the contract of the parties and holds that if the car-

rier is liable at all it is liable for the entire value of the shipment. This rule in practice means that under no conditions could the limitation of liability provided for in the contract become effective, because it would be destroyed at the very moment it was called into being by the liability of the carrier.

We respectfully contend, therefore, that the judgment of the Court of Appeal, First Circuit, State of Louisiana, is wrong and should be reversed.

Respectfully submitted,

HUNTER C. LEAKE,
ARTHUR A. MORENO.

H. S. MARX,
A. M. HARTUNG,
Of Counsel.

FILED
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WM. R. STANSBU
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. [redacted]54

AMERICAN RAILWAY EXPRESS COMPANY

vs.

LUCIUS P. LEVEE.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIRST CIRCUIT, OF THE STATE OF LOUISIANA.

MOTION TO DISMISS.

CHARLES T. WORTHAM,
Counsel for Appellee.

(28,974)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 424.

AMERICAN RAILWAY EXPRESS COMPANY

vs.

LUCIUS P. LEVEE.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIRST CIRCUIT, OF THE STATE OF LOUISIANA.

MOTION TO DISMISS.

Now comes Lucius P. Levee, the respondent, and moves to dismiss the writ of certiorari herein issued for want of jurisdiction on the following grounds, to wit:

I. Because it was not "applied for within three months after entry of the judgment complained of."

II. Because it was not directed to the highest court of the State of Louisiana in which a decision of the question at issue could be had.

III. Because the decision of the State appellate court which was declared to be correct by the State Supreme Court did not involve a Federal question.

CHAS. T. WORTHAM,
Counsel for Respondent for the Purposes of This Motion.

Mr. A. A. MORENO,
Counsel for the American Railway Express Co.:

PLEASE TAKE NOTICE that on the 4th day of June, A. D. 1923, the motion of which the foregoing is a copy will be submitted to the Supreme Court of the United States for the decision of the court thereon.

Annexed hereto is a copy of my brief or argument in support of said motion.

(Signed) CHAS. T. WORTHAM,
Counsel for L. P. Levee for the Purposes of This Motion.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 424.

AMERICAN RAILWAY EXPRESS COMPANY

vs.

LUCIUS P. LEVEE.

STATE OF LOUISIANA,
Parish of Ascension:

Before me, the undersigned notary public, personally came and appeared Mr. Chas. T. Wortham, a resident of the Parish of Ascension, to me well known, and who, having been by me duly sworn, deposes and says:

That he is the counsel for the respondent in the foregoing numbered and entitled cause, and that a true and exact duplicate copy of the motion and of the notice to which this affidavit is attached as part thereof was by him mailed, together with a copy of the brief in support of said motion, to Mr. A. A. Moreno, attorney for petitioner, addressed to him at his usual and proper address, all duly postpaid, within ample time to reach the said A. A. Moreno by due course of mail more than three weeks before June 4th, 1923.

CHAS. T. WORTHAM.

Sworn to and subscribed before me this 8th day of May, A. D. 1923.

[Seal of Clyde V. St. Amant, Notary Public, Parish of Ascension, Louisiana.]

C. V. ST. AMANT,
Notary Public.

[Endorsed:] File No. 28,974. Supreme Court U. S., October term, 1922. Term No. 424. American Railway Express Co., appellant, *vs.* Lucius P. Levee. Motion to dismiss, notice, and proof of service. Filed May 11, 1923.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923.

No. 54

(No. 424, October Term, 1922)

AMERICAN RAILWAY EXPRESS COMPANY,
Petitioner,

versus

LUCIUS P. LEVEE,
Respondent.

On Writ of Certiorari to the Court of Appeal, First Circuit, of the State of Louisiana.

Brief on the Merits on Behalf of Lucius P. Levee, Respondent.

CHAS. T. WORTHAM,
Attorney for L. P. Levee,
Respondent.

IN THE

SUPREME COURT OF THE UNITED STATES

(No. 424, October Term, 1922)

No. 54

AMERICAN RAILWAY EXPRESS COMPANY,
Petitioner,

versus

LUCIUS P. LEVEE,
Respondent.

On Writ of Certiorari to the Court of Appeal, First Circuit, of the State of Louisiana.

Brief on the Merits on Behalf of Lucius P. Levee, Respondent.

BRIEF.

MAY IT PLEASE THE COURT:

Statement of Facts

This is the third brief filed by the respondent in this matter. The first brief was filed in opposition to the

granting of the writ by this Court, and then after the granting of the writ, a second brief was filed by him in support of his motion to dismiss.

This motion to dismiss was deferred by the Court for further consideration when the case would come up upon oral argument.

In the present brief we will not repeat any of the arguments made in the motion to dismiss, but will attempt to confine ourselves to argument upon the merits of the case as though the motion to dismiss had been denied. We do not mean, however, by this action to waive any rights which we might have upon the motion to dismiss, but earnestly ask the Court's attention to our former brief on the motion to dismiss, earnestly believing that that motion should be sustained.

The circumstances under which the shipment in question was delivered to the Express Co. are to be found on pages 29 and 30 of the record. See also the findings of fact by the trial Judge, p. 8.

Respondent was leaving Madisonville, Texas, for Thibodaux, La. He placed all of his property, including Liberty Bonds and other valuables, in a trunk. Just before his train left Madisonville, he took the trunk to the Express Office and asked to have it expressed to Thibodaux. The agent said, "Why don't you check it?" Respondent said, "No, I have some valuable papers and other valuables in the trunk, and I do not want to take

the chance of having it lost as baggage; I want it expressed to Thibodaux, and I want you to seal the trunk and express it." The agent stated that he did not know the rates, that he could not apply a rate on it; that he would ship the trunk and that Mr. Levee could pay the express charges at Thibodaux. However, he made out a receipt and handed it to Mr. Levee, but would not accept any money. Mr. Levee cautioned him very emphatically about sealing the trunk. Mr. Levee took his receipt, got on the train and left. Mr. Levee told the express agent that the trunk contained valuable papers and other valuables, but the agent did not ask him the value.

His reason for not wishing to send it as baggage was that it would not have been accepted at a valuation over about One Hundred and Fifty ($150.00) Dollars.

All we know of the subsequent history of this trunk is that it has never been delivered to us, and that the Express Co. has not made the slightest attempt, either by pleading or by proof, to show us what did happen to this trunk.

Pleadings (P. 18, Record).

The petition of respondent filed in the trial Court simply sets out:

(1st) The delivery of the trunk to the Express Co. under the circumstances and for the purpose aforesaid.

(2nd) Failure and refusal of the Express Co. to redeliver the trunk at Thibodaux or elsewhere.

(3rd) The value of the trunk and its contents.

(4th) The prayer is for judgment for the value.

THE ANSWER of the Express Co. (Tr., p. 26 et seq.) simply admits all of the foregoing allegations except that regarding value, and without in any way alleging or informing us what had become of the trunk, they set up the defense that under the receipt which its agent gave to Mr. Levee they were liable only for the sum of Fifty ($50.00) Dollars.

THE JUDGMENT of the State Court of Appeal now before this Court for review (Tr., p. 14 et seq.) was based upon the fact that the defendant had not carried the burden of proof imposed upon him by the law and jurisprudence of Louisiana in that it had shown no reason or excuse whatever for its failure and refusal to deliver the trunk as agreed: citing Article 2754 of the Louisiana Civil Code and quoting the same in full. Lahmann vs. M. L. & T. R. R., 115 La. 1; Sims vs. N. O. & N. E. R. R., 112 La. 268; National Rice Milling Co. vs. N. O. & N. E. R. R., 132 La. 615.

Argument.

Counsel for petitioner attempted to bring the case under the Cummins' Amendment, Act of March 4th,

1915, Chap. 176; 38 Stat. at L., 1196, as amended by Act of August 9th, 1916, Chap. 301; 39 Stat. at L. 441; Comp. Stat. Sect. 9582; Fed. Stat. Anno. Supp. 1918, p. 387.

We would attempt to show the Court that the present case does not come within the terms of that statute, and that there is a deep harmony between the decision of the Louisiana Court of Appeal (Record, p. 14) and the decisions of this Court upon the subject. The amendment (Act of March 4th, 1915, Chap. 176) makes the carrier liable to the shipper *"for any loss, damage or injury to such property caused by it," etc.*, notwithstanding any limitation of liability or recovery or representation or agreement as to value. See Am. R. Ex. Co. vs. Lindenburg, Law Ed., Advance Opinions 1922-1923, No. 7, page 228. This is amended by Act of August 9th, 1916, Chap. 301, 39 Stat. at L. 441; Fed. Stat. Anno Supp. 1918, page 388. The amendment refers only to the *loss, damage* or *injury* covered by the act which it amends. It is therefore clear that to bring any case within this statute, which with the amendment we will refer to as the Cummins' Amendment, the carrier must show that the shipment has been *lost by it, damaged by it or injured by it.*

In this case we did not know, and had no means of knowing whether the trunk had been lost, destroyed, or injured to such an extent that the remnants were thrown away as worthless, or whether the carrier still has our

trunk somewhere in its possession. We did not know whether the trunk had been delivered to some other person or whether it had been sent to a wrong delivery point and sold to cover freight charges. All these matters with a thousand other contingencies which might be mentioned were entirely within the knowledge of the carrier; that is to say, the law holds the carrier to such knowledge, the property being in its possession and under its control.

The law certainly does not impose upon a shipper, when he delivers a package to a carrier, the duty of following it up and keeping posted as to its whereabouts, from the time of its delivery to the carrier until delivered by the carrier at its destination.

We therefore brought our suit the only way we could bring it which was strictly upon the contract of carriage. All that we were required to prove to make a case was delivery to the carrier, and the failure of the carrier to redeliver to us. If the carrier had any defense to this suit it should have been set up in its answer and supported by proof upon the trial. The only defense set up by the carrier is the limited liability clause. In order to succeed upon this defense it is necessary for the carrier to show a case which brings it within the terms of the Cummins' Amendment as amended.

To do this it was absolutely necessary for the carrier to allege and prove that the trunk had been lost by it.

We do not mention damage, or injury, because that would suppose the trunk had been delivered in a damaged or injured condition, as in the Lindenburg case, cited supra.

We feel that we have an inherent right to know what became of this trunk in order that we may know whether or not we have been lawfully deprived of our property.

To reverse the judgment rendered in this case upon the pleadings and proof as they appear in the record would be to place it within the power of any carrier to keep a valuable shipment and appropriate it to its own use, and be liable for only $50.00. *It is our right to know* what became of the trunk. For instance if the answer (and proof) had informed us that the trunk was lost by the carrier, and when, where and how lost, we might have been able to trace and recover the Liberty Bonds, which are our property.

The enforcement of this rule as to pleading and burden of proof imposes no hardship upon the carrier. He is supposed to keep a record of the shipment as it moves from point to point. Every express messenger who handles the shipment is supposed to obtain a receipt from the person to whom he delivers it.

Therefore if the trunk fell from the express car into the Sabine River and could not be recovered, that fact, under a *valid* limited liability clause, would relieve the carrier from all liability over $50.00; but that fact in

order to relieve the carrier must be so pleaded and proved.

If the shipment went to some point in Ia., instead of La., bearing a similar name, and was there sold as unclaimed freight, we have a right to know that fact. *The answer in this case amounts to an admission by the carrier that it converted the goods.*

It strikes us, upon most elementary principles, that this point is well taken, and that the carrier in this case has not by its defense brought itself within the proviso established by the amendment of August 9th, 1916, and that the judgment of the State Court must be affirmed.

So far we have been able to find only one case of this kind which has been passed on by this Court since the amendment of 1916, and that is the case of American Ry. Express Co. vs. Lindenburg, 67 Law. Ed.; Advance Opinions 1922-1923, No. 7, page 227. This being the last case decided by this Court, and maintaining as it does the defense raised here by the petitioner, we will now compare the Lindenburg case with the present case and endeavor to show the differences between the two cases.

1st: In the Lindenburg case the value of the property was neither stated by the respondent nor demanded by the petitioner, and the charges were paid on the basis of the limited liability set forth in the receipt.

In the present case, the shipper did declare the value to be far over Fifty ($50.00) Dollars, in that he told the agent that the trunk contained valuables, and that he did not wish to take it with him as baggage because in that event he would be able to recover only One Hundred and Fifty ($150.00) Dollars.

The respondent here has paid no charges and accepted the proposition of the carrier's agent, that he would pay the charges at destination. He was ready and willing to pay these charges at the time, and has always been ready and willing to pay the charges established by the Interstate Commerce Commission whenever the trunk is delivered to him.

The universal holding is that the reduced carriage charge is the *consideration* for the limited liability clause. In the present case there is no such consideration for it was the agent's fault that the value was not stated in the receipt and was left in blank. The conduct of the agent in omitting the valuation from the receipt and handing the receipt to respondent, with valuation omitted, under the circumstances, respondent being about to catch a train to the agent's knowledge, amounted to a fraud, and the fraud of the agent is the fraud of the Company.

It was entirely the fault of the Company that the receipt was not properly filled by the agent according to respondent's statement to him at the time.

"The choice of rates must be given understandingly and freely."

"The rate must be tied to the release."

U. Pac. Railroad Co. vs. Burke, 65 Law. Ed. 659.

2nd: In the Lindenburg case it was shown that at the time of the shipment there was in effect a tariff governing rates between Indianapolis and Charleston, duly published and filed with the Interstate Commerce Commission setting forth the form of receipt approved by the Commission, and the charges made were in accordance with this tariff. The trunk in the instant case was shipped on February 8th, 1919. This testimony of the agent at Thibodaux (Record, p. 33) shows the rate existing at the time of the trial on June 11, 1920. The documents filed by petitioner (p. 34 et seq.) show that certain schedules had been filed with the Interstate Commerce Commission but no attempt is made to set out these schedules; and most of them are declared to have been in force on February 9th, 1919, which was the day after the shipment was made.

The uniform express receipt approved by the Commission, as given in the record on pages 35-36, contains none of the conditions printed on the back of the receipt; and Condition No. 2 is the very condition on which respondent relies in this case.

It may be that the schedules and conditions annexed to the receipt were filed in the lower Court and were by inadvertance omitted in making up the record for

this Court. If such were really the fact, we have no desire to take advantage of the omission, but are merely calling the Court's attention to the state of the record, and it is plain that according to the record in this Court all of these essential matters were not proved as they were proved in the Lindenburg case.

3rd. In the Lindenburg case the goods were shown to have been delivered by the carrier, *damaged;* and the action was for the amount of the damage *caused by the carrier.* The case was strictly under the Cummins Amendment.

The present suit is for the value of the goods, not because the carrier *lost them,* but because he failed and refused to deliver them, being in the nature of an action for conversion. To defend this action under the Cummins Amendment as amended, the carrier should have set up and proved that it lost the trunk. In Ft. Smith & W. R. Co. vs. Awbrey, 39 Okla. 270; 134 Pac. 1117, it was held that a clause limiting the liability, "in the event of the loss of the property," did not furnish the measure of damages for delay in delivering the property.

See also Delaney vs. U. S. Exp. Co., 70 W. Va. 502; 74 S. E. 512.

CONCLUSIONS.

From the foregoing Statement of Facts, and Argument, we conclude:

(1)

It Was The Carrier's Fault, Fraud.

Under the circumstances stated, and considering the declarations regarding value made by the shipper at the time of shipment, it was entirely the fault of the carrier, that the statement of value was not inserted in the receipt. The leaving the amount in blank, with the statements made by the carrier's agent at the time induced the shipper to believe that the value would be fixed and the rate determined at destination, where the charges were to be paid. To hold the shipper to the strict terms of a receipt delivered under such circumstances, with the statements made at time of delivery of the receipt, would be to give effect to a *fraud* on the part of the carrier's agent. McFadden v. M. P. R. R. Co., 92 Mo. 343, 1 A. S. R. 721; 10 Corper Juris, p. 140, Sec. 178; Christenson v. Exp. Co., 15 Minn. 270, 2 Am. R. 122.

(2)

Proper Action Brought.

The shipper in this case brought the only action which, under the circumstances, could be brought against a carrier who fails and refuses to deliver freight entrusted to it. Refusal to deliver is conversion; and the action being for the value is in the nature of an action for conversion. Loss of the goods by the carrier is a defense, knowledge of which is peculiarly within

the carrier and not in the shipper. Failure to set up this defense, or any other valid defense, is an admission of the conversion by the carrier, and judgment must go against it on the face of the pleadings.

(3)

Cummins Amendment Does Not Apply.

The Cummins Amendment has no application in the state of the pleadings and proof. It does not purport or pretend to apply to a case of conversion by the carrier.

The Cummins Amendment confines the limitation of liability to cases of *loss by the carrier, damage by the carrier and injury by the carrier.* The express receipt goes far beyond the purview of these three stated instances and relieves the Express Co. from any liability beyond Fifty ($50.00) Dollars, *"in any event."*

So far as the receipt limits this liability *"in any event"* it goes beyond the terms of the law, and if the Interstate Commerce Commission has approved this receipt, the Commission went beyond the terms of the law.

These words "in any event" would protect the Commission in any case falling under the headings of "Loss by it," "Damage by it" or "Injury by it" but could not be construed or given effect outside of those three headings. *The Cummins Amendment has no effect upon the*

carrier's contract to carry and deliver the freight, except where the freight is lost by the carrier, damaged by the carrier or injured by the carrier.

The petition, answer and proof in this case have not brought it within the Cummins amendment. So far as the record shows, the trunk is still in the carrier's possession, and the carrier having failed to deliver the trunk, judgment must go against the carrier. The carrier says in this case, "Yes, I received your trunk for carriage to Thibodaux, but as you have admitted, that the trunk is worth only $50.00, I am absolved from all obligation to carry or deliver it by simply paying you $50.00." Such is not the law.

The limited liability clause was intended as a reasonable protection to the carrier against the ordinary cases of negligence and thefts which occur in Interstate Commerce. There are many acts against which the carrier would not,, in good conscience and from public policy, be allowed to claim the benefit of this clause. See 10 Corpus Juris, p. 184. In fact while the clause protects the carrier in case of loss by negligence or passive acts, it cannot relieve it from the consequences of any affirmative acts of wrong doing.

4 R. C. L., verbo Carriers, p. 793, Sec. 251; 12 Ann.Cases 1132 Note.

Adams Express Co. vs. Berry, 35 App. D. C. 208; 31 L. R. A. (N. S.) 309 and note.

Central Ry. Co. vs. Chicago P. Co., 112 Ga. 11; 106 A. S. R. 87. Ann Cas. 192 D. Note, p. 990.

McKahan vs. Am. Exp. Co., 209 Mass. 270; 95 N. E. 785; Ann. Cas. 1912 B. 612.

D'Utassy vs. Bartlett, 219 N. Y. 420; 114 N. E. 786; 5 A. L. R. 979.

Fessler vs. Detroit Co., 5 A. L. R. 983, note p. 986.

(4)

Consideration

The consideration for the limited amount of liability has been universally held to be the reduced rate charge.

U. Pac. R. Co. vs. Burke, 65 L. Ed. 659.

In this case an "*affirmative* act of wrong doing" was committed by the carrier's agent in falsely making out the receipt, at the time of the statements of value made by the shipper, and stating to the shipper that value and rate would be determined at destination. Under these circumstances, the stipulation regarding value does not prevent the shipper from recovering full value.

4 R. C. L. verbo Carriers, p. 793, Sec. 251, 12 Ann. Cas. 1133, note.

Gillespie vs. Pratt, (Supra. Ct. App. T.) 19 Misc. (N. Y. 43, 42 N. Y. Supp. 876).

No rate was paid by the shipper, and it was still the carrier's duty to charge the full rate upon delivery.

T. & P. Railway Co. vs. Mug., 202 U. S. 242, 50 L. Ed. 1011.

"The Statute expressly provides that it (the carrier) should not charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service connected therewith, than such as was specified in such schedules."

U. Pac. R. Co. vs. Burke, 65 L. Ed. 658, 255 U. S. 319.

The shipper expected to pay the full rate upon delivery, and therefore there is in this case no consideration for the limitation of liability. "The rate must be tied to the release." "The choice of rates must be given understandingly and freely." Burke case supra.

Moreover the petitioner has failed to prove the two rates in force, *on the day of the shipment.*

(5)

Estoppel.

In all of the cases from Hart vs. Penn. R. Co., 112 U. S. 331, 28 L. Ed. 717; 5 S. C. 151, to Am. Exp. Co. vs. Lindenburg, 67 L. Ed. 230, *estoppel* is made the basis of the ruling holding the shipper bound by the limited value clause. "Having accepted the benefit of the lower rate,

in common honesty the shipper may not repudiate the conditions on which it was obtained. * * * "This Court has consequently held the law to be that it is against public policy to permit a common carrier to limit its common law liability by contracting for exemption from the consequences of its own negligences and that of its servants, and valuation agreements have been sustained only on principles of estoppel, and in carefully restricted cases, where the choice of rates was given,—where 'the rate was tied to the release.'"

Union Pacific R. Co. vs. Burke, 65 L. Ed. 659; 255 U. S. 321.

In the present case the estoppel is on the other side, and operates against the carrier, because the shipper distinctly stated at the time of shipment that he chose the Express Co. as his carrier, in order that his valuable shipment might be fully protected; and was actually prevented by the carrier's agent from making declaration of value; and actually let to believe that the omission of the value from the receipt left the value and rate to be fixed at destination. The shipper did not accept the benefit of a lower rate, and there is no estoppel as to him.

(6)

Except as exempted by a valid contract the carrier remains a carrier and subject to all the obligations of such.

10 Corpus Juris, p. 187, 241.

Respectfully submitted,

CHAS. T. WORTHAM,

Atty. for Respondent.

AMERICAN RAILWAY EXPRESS COMPANY *v.* LEVEE.

CERTIORARI TO THE COURT OF APPEAL, FIRST CIRCUIT, OF THE STATE OF LOUISIANA.

No. 54. Argued October 8, 1923.—Decided October 22, 1923.

1. When by the constitution of a State the jurisdiction of its highest court to review a judgment of an intermediate tribunal is discretionary, and review is declined, the writ of certiorari from this Court should be addressed to the intermediate tribunal. P. 20.
2. The fact that the highest state court in such case, being required by the state constitution to give reasons for declining, does so by an opinion upon the merits, does not take from the refusal its character of declining jurisdiction. P. 21.
3. The limit of time for applying here for certiorari dates from the refusal of the highest state court to review the decision of the intermediate court. *Id.*
4. A state statute placing upon the carrier, when sued for the value of goods consigned but not delivered, the burden of proving that the loss or damage was occasioned by accidental and uncontrollable events (La. Rev. Civ. Code, Art. 2754,) cannot affect a limitation of liability for an interstate shipment, agreed upon and valid under the federal law. P. 21.

Reversed.

CERTIORARI to a judgment of the Court of Appeal of Louisiana, First Circuit, which affirmed a judgment for damages, recovered by the respondent against the petitioner Express Company.

Mr. Arthur A. Moreno, with whom *Mr. Hunter C. Leake, Mr. A. M. Hartung* and *Mr. H. S. Marx* were on the briefs, for petitioner.

Mr. Charles T. Wortham for respondent.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a suit brought by the respondent in a court of Louisiana to recover the actual value of a trunk and its contents, weighing one hundred pounds or less, delivered to the petitioner for carriage from Madisonville, Texas, to Thibodaux, Louisiana, but not delivered by the latter. The plaintiff's petition set forth the receipt given by the Company, which was in the usual form approved by the Interstate Commerce Commission, and by which "In consideration of the rate charged for carrying said property, which is dependent upon the value thereof and is based upon an agreed valuation of not exceeding fifty dollars for any shipment of 100 pounds or less . . . the shipper agrees that the company shall not be liable in any event for more than fifty dollars for any shipment of 100 pounds or less"; with other language to the same effect. At the trial the defendant relied upon this limitation of its liability. But the Court following Article 2754 of the Revised Civil Code of Louisiana held that the burden was on the carrier to "prove that [the] loss or damage has been occasioned by accidental and uncontrollable events," and gave the plaintiff judgment for $863.75 and interest. The Court of Appeal took the same view and said that failure to make that proof was equivalent to an admission of converting the property to its own use. The defendant applied to the Supreme Court of the State for a writ of certiorari, but the writ was "refused for the reason that the judgment is correct."

A preliminary objection is urged that the present writ of certiorari was addressed to the Court of Appeal and not to the Supreme Court. But under the Constitution of the State the jurisdiction of the Supreme Court is discretionary, Art. 7, § 11, and although it was necessary for the petitioner to invoke that jurisdiction in order to make it certain that the case could go no farther, *Stratton* v. *Stratton*, 239 U. S. 55, when the jurisdiction was declined the Court of Appeal was shown to be the highest Court

of the State in which a decision could be had. Another section of the article cited required the Supreme Court to give its reasons for refusing the writ, and therefore the fact that the reason happened to be an opinion upon the merits rather than some more technical consideration, did not take from the refusal its ostensible character of declining jurisdiction. *Western Union Telegraph Co.* v. *Crovo*, 220 U. S. 364, 366. *Norfolk & Suburban Turnpike Co.* v. *Virginia*, 225 U. S. 264, 269. Of course the limit of time for applying to this Court was from the date when the writ of certiorari was refused.

Coming to the merits, the limitation of liability was valid, whatever may be the law of the State in cases within its control. *Adams Express Co.* v. *Croninger*, 226 U. S. 491. *Union Pacific R. R. Co.* v. *Burke*, 255 U. S. 317, 321. *American Ry. Express Co.* v. *Lindenburg*, 260 U. S. 584. The effect of the stipulation could not have been escaped by suing in trover and laying the failure to deliver as a conversion if that had been done. *Georgia, Florida & Alabama Ry. Co.* v. *Blish Milling Co.*, 241 U. S. 190, 197. No more can it be escaped by a state law or decision that a failure to deliver shall establish a conversion unless explained. The law of the United States cannot be evaded by the forms of local practice. *Rogers* v. *Alabama*, 192 U. S. 226, 230. Under the law of the United States governing interstate commerce the stipulation constituted a defence to liability beyond fifty dollars, unless the plaintiff should prove some facts that took the case out of the protection of the contract. It had that scope in whatever Court it came up. The local rule applied as to the burden of proof narrowed the protection that the defendant had secured, and therefore contravened the law. See *Central Vermont Ry. Co.* v. *White*, 238 U. S. 507, 512. *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *Rankin*, 241 U. S. 319, 328. *E. Borneman & Co.* v. *New Orleans M. & C. R. Co.*, 145 La. 150.

We think it unnecessary to follow the arguments addressed to us into further detail.

Judgment reversed.

DAVIS, DIRECTOR GENERAL OF RAILROADS